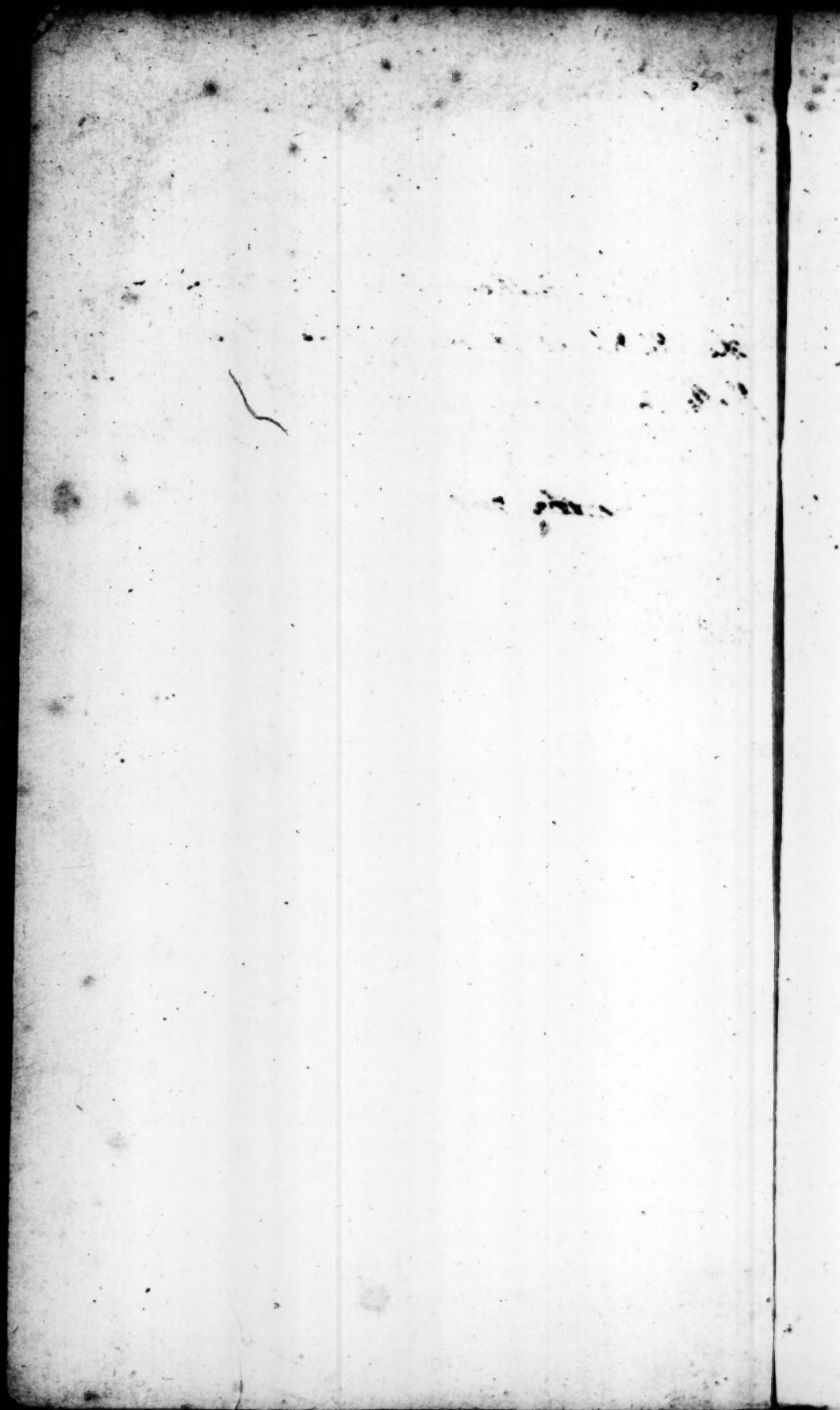


f

The Author of the 'Discourse on  
the Judicial Authority of the Master of the  
Rolls' in the preface to his 2<sup>d</sup> edition ~~states~~  
considers this book as written by the ~~same~~  
person, ~~as the~~ who was the author <sup>of</sup> the  
'Legal Judicature of the Chancery  
Suits'.

H. H.







883. g. 20.

883.g.20

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THE  
HISTORY  
OF THE  
CHANCERY.

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**HISTORY**  
OF THE  
**CHANCERY;**  
Relating to the  
**Judicial Power**  
OF THAT  
**COURT,**  
AND THE  
**RIGHTS of the Masters.**

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*Nihil est Potestas, ut sapientes definiunt, nisi  
cura salutis alienæ.*

Amianus, Lib. 6.

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L O N D O N :

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MVSEVM  
BRITANNICVM

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THE  
HISTORY  
OF THE  
CHANCERY;  
RELATING

To the Judicial Power of that  
COURT, and the Rights of the  
MASTERS.

THE Court of *Chancery* has in it (a)  
two Powers, or Courts, one or-  
dinary, the other absolute; the  
first is a Common (b) Law Court, the other  
a Court of Equity.

The (c) Office of Chancellor, in its first  
Creation) whether by our *British* or *Saxon*  
B An-

(a) *Camb.* 81. (b) *Staunf. Prerog.* 63.

(c) *Fleta*, l. 2. c. 12. How anciently created,  
*vide ibid.* & *Jan. Angl.* Placed and displaced by  
Parliament. *Cotton's Records* 183, 185. 208. *Jervas*  
*Dorober*, 1653. So High Treasurer, Archbishops and  
Bishops, *Ingulph. Hist. Antiq. Eccles. Brit.* 63.



Ancestors, no matter to the present Purpose) can so far be traced up into the Ages past, as to discover that it has always been an Office of the first Rank. *Robert Fitz-Stevens*, the Writer of the Life of *Thomas a Beckett*, styles the Lord Chancellor the Second Person in the Government, in which all Things by his Direction and Advice were moved. He hath the Keeping of the King's Seal, and may with it sign and seal his own Injunctions. He is to be present at all the King's Councils, and to repair thither uncalled. He disposed and ordered the King's Chaplains as he pleased. He received and kept Archbishopricks, Bishopricks, and Abbies, that fell into the King's Hand. To him it belonged, by vertue of his Office, to present to the King's Churches, to visit all Hospitals of Royal Foundation, and the King's free Chapels; for such are not visitable by the Ordinary. Another Person, about the same Time, says, *Sine ipsius consensu, vel consilio, nullum magnum fiat, vel fieri debeat*. He is Speaker of the House of Lords; except extraordinary Occasions prevent him.

The



The *Chancery* at first, however, had probably no Relation to the Administration of Justice, but rather was a political College of Secretaries, or Clerks, for the writing of Treaties, Grants, and other publick Business; over whom the Chancellor presided: (a) Pretty near the Nature of which is the Office in some Countries at this Day; *Ejus fuit (b) responsa Imperatoris atq; mandata inspicere*; with us, Time out of Mind, it has been a (c) Court of Record, an *Officina Brevium*, from whence did issue all original Writs, according to Sir *Edward Coke*; but that is a Mistake, all original Writs did not issue from thence, till after *Henry*

B 2

the

(a) As in *Germany, Poland, Sweden*; but in *France* it has a very near Analogy to ours. *Eg. Cant. 11, 12.*

(b) *Camb. 131. 180.*

(c) The Abbot of *Battle* claimed Cognizance of Pleas in the Times of King *Etheldrid*, and *Edward the Confessor*, and before that, Time out of Mind; and pleaded a Charter of Confirmation from *H. 1.* to his Predecessor, so that the Justices of one Bench nor the other should intermeddle: As also one *Walston* had a Pardon enrolled in the Court of *Chancery*, *Anno 872. Reg' Alfrido. 2 Inst. 23. 36. Ass. 24.* So that the *Chancery* has been a Court of Record, or Common-Law Court, Time out of Mind.

the II<sup>d</sup>'s Time; for in *Glanville's* (a) Book, that was wrote in that Reign, original Writs were *Teste Ranulpho de Glanvilla*, the Chief Justice of the King's Bench at that Time: Whereas original Writs from the *Chancery* were *Teste Rege*; therefore the *Chancery* had not in the Beginning the *Wholesale Trade* of original Writs.

As it is a Common-Law Court, the Proceedings are *coram Rege in Cancellario*; it hears and determines Causes, and Offences given by several Acts of Parliament, *secundum legem & consuetudinem Angliæ*, as also by *Latin Bill*, in Pleas of Debt by Attachment of Privilege, or on Recognizances, if the Party chuses not to go against the Land by (b) *Elegit*, since the Statute of

(a) *Glanv.* 3. 31. 36. 2. *Inst.* 552. *Eg. Cant.* 26.

(b) By the Common Law, Land could not be taken in Execution, nor even the Defendant's Body, for Debt and Damages; the Reason was, that a Man should be at Liberty to follow his Husbandry and Affairs; as also to serve the King and Country, when there was Occasion. The Common Law went no further in this Case than his Goods, Corn, and other present Profits that grew upon the Land, by *levari facias*, or *feri facias*, to be sued within the Year; and if the Year was expired, then an Action of Debt lay; but by *W. 2.* upon a Recognizance, the

of *Westm.* 2. also upon *Scire Facias* to repeal Patents, Statutes, *Auditâ Querelâ*, Petitions, Offices, *Monstrans de Droit*; also Wards and Liveries, and *Ouster le mains*, before a special Court was erected for those Purposes, were cognizable here. Hence go Pardons and Commissions of all Kinds, Writs of *Congé d'elire*, and hither Offices *virtute brevis & officii* are returned. And if Issue is joined in this Court, Day is given to the Party to appear in the King's Bench, and the *Venire* is returnable *coram nob' ubicunq; &c.* And the Record of the Writ is delivered *per manus Cancellar'* into the King's Bench, and after Issue tried it is remanded back to the *Chancery* for Judgment to be given; but a Writ of (a) Error lies in the King's Bench. The Chancellor

B 3 has

the Cognizee may have an *Elegit* against the Land of the Cognizor, 2 *Inst.* 394, 3 *Rep.* 12.

(a) 4 *Inst.* 80. 22 *H.* 4, 5. *West. Symb.* 177. *Com.* 393. *Rex versus Cary*, Mr. Wallop moved for a Writ of Error into B. R. on a Judgment in the Petty Bag, but denied. The Lord-Keeper was pleased to think *Dyer* and *Coke's* Opinion ill founded, and thought the Jurisdiction of the *Chancery* on the *Latin* side not subject to be controuled by B. R. and said he wou'd enjoin all such Writs of Error. *Vern.* 131.

has his Commission by the Delivery of the Seal; of which there is a Modern Instance so singular, concerning two Names of Honour, that the Reader will not be displeased, perhaps, to have it at length.

*Memorandum, Quod 16<sup>o</sup> die Maij 24<sup>o</sup> Henrici 8vi. magnum Sigillum Regni in Custodia egregij viri Thomæ Moor, Mil' tunc Cancellar' Angl' existens, in quadam Baga, de albo Corio, inclusum, & sigillo ipsius Thomæ in cero signat' in manibus dicti Domini Regis apud manerium suum vocat' York-Place, juxta vill' de Westm' in horto suo ibid' circa horam tertiam post meridiem, in presentia Thomæ Ducis Norfolciæ, deliberatum fuit; dictusq; Thom' Moore, tunc & ibidem officium Cancellarij Angliæ in manus dicti Domini Regis sursum reddidit, eodemq; sigillo in custodia dicti dom' Regis remanente, idem Dominus Rex postea, scilicet die Lunæ 20<sup>o</sup> die Maij tunc prox' sequen' circa horam quartam post meridiem, apud maxer' suum de Pleasaunce, alias East Greenwich, in quadam interiori Camera prope Oratoriũ suum ibid' presentia spectabilium virorum Thomæ Ducis Norfolciæ Thesaurarij Angliæ, Henrici Marchion' Exon' Henrici Comit'*

Comit' Northumber' Roberti Comit' Suffex,  
 Steph' Epis' Winton' Will' Fitzwilliams  
*Tthesaurar' Hospitij Domini Regis*, Brian  
 Tuke, *Tthesaurar' Camerar' dicti Domini*  
*Regis*, Will' Kingston, Johan' Sampson,  
*Clerici Decani Capellæ dicti Domini Regis*,  
 Thomæ Cromwell *Armig' Custod' Rottul'*  
*dicti Domini Regis*, & al' *privat' Cam' ejus-*  
*dem Domini Regis extra Bagam illam ex-*  
*trahi fecit, & aperiri, & sigillum illum in ma-*  
*nus suas proprias accepit, tractavit & conspexit,*  
*& post conspectionem illam idem sigillum di-*  
*lecto suo Thomæ Audley tradidit & deli-*  
*beravit, cui tunc custodiam dicti sigilli commi-*  
*sit, ipsum Thomam Custodem magni sigilli*  
*vocari, nuncupari, & appellari, & omnia &*  
*singula facere & exercere, tam in Cur' Can-*  
*cellar' dicti Domini Regis quam in Camera*  
*stellata; et consilio ejusdem Domini Regis*  
*prout' Cancellar' Angl' facere & exercere*  
*solebat, declaravit & expressé mandavit :*  
*Et idem Thomas curam & custod' ejusdem*  
*sigilli in se tunc & ibid' accepit, &*  
*quasdam Literas Patentes de officio Senescal'*  
*Maner' de Lewisham, & East Greenwich,*  
*in Com. Kanc. cuidem Henrici Norris Ar'*  
*factas in presentia dicti Domini Regis & al'*  
*supra*



*supra nominat' sigillari fecit, posteaq; ibid' sigillum illud in Baga præd' reponi, & sigillo proprio ipsius Thomæ consignari fecit, & penes se continet; sicque sigillum illud in custodia ipsius Thomæ quem idem Dominus Rex ordine militari tunc insignivit auctoritate Regis remansit, & remanet: Et postea die Mercur' quinto die Junij tunc prox' sequen' ipso die existens primo die Termini, scil' Trin' Anno præsentis præfatus (a) Thomas Audley Dominus Custos Magni Sigilli' Regii in Cur' Cancellar' præd' apud Westm' in presentia dicti illustrissimi principis Thomæ Ducis Norfolciæ, &c. Sacrum prestitit corporale, de officio suo bene & fideliter exercendo & occupando; The Substance of which is, to do Right, after the Laws and Usages of the Realm.*

I forbear running over the legal Jurisdiction of the Court, in all its Branches; 'tis sufficient for me now to observe, that the Judicial Authority thereof, is solely vested in the Chancellor, or Keeper of the Seals.

From

(a) He was Attorney of the Dutchy, then constituted Speaker of the Parliament, Keeper, Lord Audley of Walden, Chancellor, and Knight of the Garter.

From this transient View of the Common Law Court of the *Chancery*, we pass to the Rise of its Court of Absolute Power, that joined it in Process of Time, which is the principal Design of these Papers to consider.

The ancient (a) Lawyers that speak of the Chancery, mention it not once as a Court or Equity or Conscience, but always as a Court of ordinary Power, to determine Causes according to the Rules of the Common Law. The Equitable Court, perhaps, had not fully join'd the other in their Time; and when they did meet, and became Brother-Courts, they did not move on *pari passu*, like *Hippocrates's* Twins. The younger soon over-run, and overpower'd the Elder, stiled it self, *Officina Justitiæ & Equitatis*, seized every thing into its Jurisdiction; and, at last, made it self a *Ware-house*, into which all our Properties was going to be cast.

This Court of Equity, or Absolute Power, under the old Constitution, was doubtless held before the King and his Council

(a) 4 Inst. 82. *Bracton*, *Britton*, *Fleta*, *Mirror*. &c.

Council in the Palace, where one Supreme Court for Business of every kind was kept. Indeed, *Ingulphus* mentions one *Thurketulus*, that was Chancellor to King *Eldred*, to whose Judgment and Decree all things were referred, and whose Determinations were to be Absolute : But from the time of King *Alfred*, till after the Conquest, the Administration of Justice ran principally thro' the (a) County, the Turn, and afterwards the Hundred and the Leets, at which, perhaps, the great Men assisted ; for in King *Edward's* Laws, cap. 5. a Bishop and an Alderman used to be present at the Hundreds, one to judge in Spirituals, the other in Temporal. There were also

(a) The Stat. of Gloucester, 6 Edw. 1. c. 8. Anno 1278, in affirmance of the Common-Law, ordains no Man to have a Trespass of Goods taken, unless he swear they were worth Forty Shillings : So all other Cases, where the Demand was under 40 s. were determined in the County, Hundred, and Courts Baron ; which then were great Courts. 40 s. in Ed. I. Time, were perhaps equal to 60 l. at this Day. Wheat, to make Bread for a hundred Men, 1 s. a large fat Ox, 1 s. Provender for 20 Horses 4 d. See Stow's Annals, Life of H. II. p. 154. and Bodmin Repub. l. 6. c. 2. p. 666, 667.



so many other Jurisdictions, like that of the Abbot of *Battle*, who had Cognizance of Pleas of Writs of Assize, and other Originals, Time out of Mind. From these Country Courts, Petitions and Appeals came to the King, as well concerning Matters of Law, as Fraud, Oppression, or against Conscience, and were relieved according to Right and Equity in this High Court; out of which all the great (a) Courts of Justice, both Ecclesiastical and Temporal, are derived.

IN the Laws of King *Edgar*, it is provided, That no Man shall seek to the King for Matter of Variance, unless he cannot find Right at home; but if that Right be too heavy for him to bear, let him seek to the King to have it lightened; which, perhaps, is the Foundation of our Writs of *Accedas ad Curiam, pone, & Recordare*, in after-times, to remove Causes from these Country Courts, before the King in his Courts at *Westminster*.

The (b) Conqueror did not alter or change the Laws of *England*, he continued the

(a) Eger. Ch. 22. Saxon Laws 97.

(b) Coke's Preface to his Third Report.

the Administration of Justice in this Sovereign Court, in his own Palace; in which he made Regulations. It was divided into several Courts of different Jurisdictions, which yet resided in the Palace Royal. The Business of the Revenue was assign'd to the Court called the *Exchequer*, by the Conqueror himself; not long after the Pleas that go by the denomination of the (a) *Pleas of the Crown* to the *King's-Bench*, and those called the (b) *Common-Pleas* to the *Common Bench*: And under this Disposition we find those three Courts, in the time of *H. I.* But the *Chancery* the fourth of these great Courts, (by the foregoing Note concerning the Abbot of *Battle*) appears to have been, Time out of Mind, distinctly known as a Court of Record.

After these Regulations, such as sought Relief by Equity were still Suitors to the King himself, who, with the Assistance of the Chancellor, and his Council, determin'd therein according to Discretion, and as the Nature of the Case requir'd. The  
King

(a) *Glanv. l. 1. c. 1. Ibid. lib. 2. c. 6.*

(b) *24. Assiz. 23, 24. 2 Inst. 23.*

King referr'd these Petitions sometimes to the Chancellor alone ; sometimes to the Chancellor and Council ; when perhaps, by the Encrease of Business, it was thought proper to turn them over to one particular Officer, the Chancellor, who was usually a Bishop, or spiritual Person, and more able than any other to judge of Equity and good Conscience, in the Opinion of the old World.

Thus the Chancellor became a standing Judge, to hear and decide Petitions ; and, in the End, People intituled their Suits to him, and not to the King ; and, instead of drawing the Suitors after the Chancellor, where-ever he was obliged to attend, by the Removal of the King's Court, a Place in *Westminster Hall*, for the Ease of the Suitors, was appointed for the hearing of Petitions.

And thus, by degrees, it came to be thought necessary to (a) adjoin to the ordinary Power of the Court, of which the Chancellor was Judge, the Office or Power to determine Matters of Conscience and Equity. C This

(a) Camb. 180, 181. v. Preface to *Glanvill*.

This ancient Course in the Administration of Justice, in Times before Power and Property were well fix'd, in which without doubt the King sometimes Judicially assisted, has fill'd some Heads with Dreams of Prerogative and Imperial Power, and I know not what (a) *plenitudo potestatis* lodged in the King by the Old Constitution: Yet, as far as I have been able to observe, this judicial Authority was not solely in the King, but was incorporated with him and his Council, *latere suo sedentibus*. He determin'd Causes no otherwise than by their Assistance, *secundum leges Terræ*, or, as sometimes it is express'd, *Leges & Consuetudines Angliæ, Statut' Angliæ, & Assisa Regni*. And if the Case was at large, and no Remedy by the Law, the absolute Power gave the Rule: It was not consider'd by those Gentlemen, that the Terms of *Sovereignty* and *Subjection* are vary'd over all the World; and with us in particular. For,

It has been resolv'd (b) by all the Judges, that the King could not, in *Person* adjudge any Cause: And, by Parliament, it has

(a) Dr. Hicks, Dr. Johnson, and others.

(b) 12 Co. 64.

has been enacted, (a) "That neither the  
 " King, nor his Privy-Council, have, or  
 " ought to have any Jurisdiction, Power,  
 " or Authority, by *English* Bill, Petition,  
 " Articles, Libel, or any other Arbitrary  
 " Way whatsoever, to examine or draw  
 " into Question, determine, or dispose of  
 " the Lands, Tenements, Hereditaments,  
 " Goods, or Chattles, of any of the Sub-  
 " jects of this Realm; but the same ought  
 " to be tryed and determined in the ordi-  
 " nary Courts of Justice, and by the or-  
 " dinary Course of Law, which is only  
 " a Confirmation of *Magna Charta*." But  
 this by the by.

And thus much at present, concerning  
 the Rise of our Court of Equity, shall suf-  
 fice : Its Opening at *Westminster*, and  
 Growth in Business, as far as may be pro-  
 per for this Subject, will be hereafter men-  
 tioned ; in the mean time, we pass on to  
 speak of the *Master of the Rolls*, and *Ma-  
 sters in Chancery*.

It seems to me, that the Officers and  
 Ministers, who wrote to the Great Seal, at

(a) 16 Car. 1. c. 10.



first were probably twelve (*a*), and no more; whose Business was to write and enter Grants, Patents, &c. For, by the Common-Law, it was necessary, that the King's Grants, and other Acts, should be enrolled; as also, that the Enrolments themselves should be kept in his own Custody, which he did in his Court of *Chancery*, to the end, that he might know how to demand his Rent, and for the Benefit of the Grantee also, that others might not obtain the Land; and this Enrolment was (*b*) made a Condition in Law, annex'd to the Grant, and the Chancellor had the Care or Charge

(*a*) I Judge thus from the Love both sacred and prophane Antiquity had to this Number. In antient Time, the King had twelve Persons that were call'd his Council of State. *Co. Lit.* 155. where is enumerated many Instances, 12 Judges, 12 Jury-men, 12 Apostles, 12 Stones, 12 Tribes. *Aug. de Civitat. Dei, lib. 18. c. 10. 1 Kings iv. 7.*

(*b*) By Stat. 37 H. 8. c. 5. The *Custos Rotulorum* in every Shire, shall be appointed by Bill, sign'd by the King's own Hand: And the Stat. 3<sup>d</sup> and 4<sup>th</sup> of Edw. 6. c. 1. takes notice, That appointing of *Custos Rotulorum* belong'd to the Chancellor; until that upon a sinister Occasion, it was taken from him.

Charge of the Records. (a) *Officium Cancellarij est Sigillum Regis custodire, simul cum Contrarotulis suis, pro proficuo Regni.*

A Writer in H. IId's Time says, *Item ad ipsum pertinet rotul' de Cancellaria custodia per suppositam personam*; the Meaning of which is, that the Chancellor kept them by his Deputy, who was called the Clerk, or Keeper of the Rolls.

In 12 Edw. II. the Keepership of the Rolls was committed to *William de Ayre-mine*, by the King, *de Assensu*, or at the Nomination of the Chancellor; and *Nicholas Watch*, that was soon afterwards Clerk of the Rolls, was stiled Clerk or Secretary of the Commands of Chancellor *Cliff*: I therefore am without any doubt, that the *Custos Rotulorum* was originally of the Chancellor's Nomination and Appointment, as the Masters are at this Day, and as the *Custos Rotulorum* in every Shire was, until the Time of H. VIII.

In 11 Edw. 3. *John St. Paul* was made Clerk of the Rolls, to hold as *John Cliff*,  
C 3 the

(a) Vide *Selden's Office of Lord Chancellor*,  
*Spelman's Gloss*, 106.

the late Clerk, injoyed it ; and took the Oath of Office before the King himself, *Robert de Stretford*, Archdeacon of *Canterbury*, that was then Chancellor, the Archbishop and others, then at *Mortlack*; whereupon *Watch*, his Predecessor, was discharged, and receiv'd a Writ to deliver the Records; by which it appears he was now become an Officer of considerable Note: and it would seem as if he was setting up and disputing a right of Office with the Chancellor, in the Appointment of a Person to be Porter of the Rolls; for, at this Time, the Court was Itinerant and carry'd from Place to Place, (a) and there was an Officer to attend with, and carry the Rolls wherever it happen'd to sit; when, perhaps, as an Expedient to decide the Contest, it was agreed, that both should join in the Appointment; which accordingly was done, and *Adam de Martyn* was the Person

(a) There was a Porter and a Horse kept, for carrying the Rolls from Place to Place. A Horse for this Service was to be sent by the Abbot of *Ramsay*, who play'd a sly Trick of Jockeyship; for instead of a good Horse, he sent a Jade, *Claus Anno 6 Edw. 3.*



Person agreed upon ; but this is my own Conjecture : And in Regard that the first Clerk of the *Chancery*, being usually prefer'd to be Keeper of the Rolls, the two Offices in Time became inseparable, as they are at this Day ; and so the Grant or Letters Patents of the one, which run *Constituimus A. B. dilectum Clericum nostrum Custodem Rotulorum*, constitute the Master of the Rolls first Master of the *Chancery*, conveying, by usage, the two Capacities together ; and some add a third, a Judicial Power to hear Causes in the Court, of which Notice will be hereafter taken.

In *Anno* 18 of *E. III.* an Oath was appointed by Parliament to be taken by him.

“ **Y**OU shall swear, That well and  
 “ truly you shall serve our Sovereign Lord the King, and his People, in  
 “ the Office of a Clerk of the *Chancery*, to  
 “ which ye shall be intituled ; and you  
 “ shall not assent to, nor procure the King’s  
 “ Disherison, nor perpetual Damage, to  
 “ your Power ; nor you shall not do, nor  
 “ procure to be done, any Fraud, to any  
 “ Man’s Wrong, nor things that touch the  
 “ keep-

“ keeping of the Seal ; And ye shall law-  
 “ fully counsel in things that touch the  
 “ King, when ye shall be thereto required ;  
 “ and the Council which you know touch-  
 “ ing him you shall conceal ; or if you  
 “ know the King’s Disherifon, or perpet-  
 “ tual Damage, or Fraud to be done upon  
 “ Things which touch the Seal, you shall  
 “ put your lawful Power to redress and  
 “ amend the same ; and if you cannot do  
 “ the same, you shall certify the Chancel-  
 “ lor, or others, which may do the same,  
 “ to be amended to your Intent.

When *H. III.* had founded a House for the  
 Reception of Convert-Jews ; to keep them  
 separate from the rest of their Nation, ’twas  
 put under the Direction and Care of an Of-  
 ficer, called the Keeper of *the House of Con-*  
*verts* (now the Rolls ; ) which Office I doubt  
 not was usually granted to one of the Chan-  
 cery-Clerks, (*a*) then living in the King’s  
 Palace ;

(*a*) *Claus’ Anno 25 Edw. 3.* an Order was sent to  
 the *Hanaper* to pay the Clerks, *de primo gradu* for Wa-  
 terage, from the Palace at *Westminster* to the Bishop  
 of *Winchester’s*, the Chancellor, about the King’s  
 Business ; by which it seems, that the Clerks yet re-  
 mained in the King’s House.

Palace; for I find it (a) granted to two successively for life, both of them also Clerks of the Rolls. And in *Anno 15 E. III.* that Office was annex'd by Charter to the Keepership of the Rolls; and in the 51st of that Reign, the Charter for some Defect in it was confirmed by Parliament, and Provision was made after the Decease of *William de Burstall*, Clerk of the Rolls, or the next Avoidance of the Office, that the Chancellor or Keeper should, for the future (b) institute thereunto: this rendered it more considerable, and after it was endowed with this House, of the Gift and Patronage of the King, the Nomination of the Clerks, by degrees, has been solely granted by the Crown, exclusive of the Chancellor. He was anciently called, *Gardein de Rolls, Clericus & Custos Rotulor'*; in latter Times, *Clericus Parvæ Bagæ, & Custos Rotulor' & Domus*  
Con-

(a) *Ry. Placita Parliamentaria*, 556. granted to *Osgodby* and *William de Ayreminis*.

(b) The Chancellor gave the Clerk of the Rolls Induction, and Instalment, into his Office, from this Time until long after, and until they continued of the Order of the Clergy; and from the Chappel and Furniture, we see about it, at this Day, I am apt to think it was anciently considered as a Church-Preferment.

*Conversor* and in no Statute, Master, until the 11th of *H. VII.* ch. 18. and yet in the 25th ch. of the same Year, he is called Clerk, and as such still takes his Oath of Office. He is now an Officer of State, is to be present at the Naming of the Justices of the Peace, Sheriffs, Escheators, Customers, Comptrollers, and other Officers, has his Rank between the two Chief Justices; and, if a spiritual Man, may be non-resident, and may act by Deputy. Doctor *Young*, the Master of the Rolls, in Commission with *Wolsey*, at the Ratification of a Treaty with *France*, (a) was stiled *Vic' Cancellarius Angliæ*, and not improperly, since, on that Occasion, it was but right for the Doctor, the King's Plenipotentiary, to appear in a Character of Honour, and that of (b) Vice-Chancellor

(a) *Rot. Franc. 6 H. 8.*

WAS

(b) *Licens' concess' Johan. Waltham Custod' Rot' Cancell' Regis ad deputand' sufficien' deputat' loco suo*  
 9<sup>o</sup> R. 2. There have been two Sorts of Vice-Chancellors amongst us, one, as I take it, exercising the Function of a Lord Chancellor, in Matters of Justice, or as an ordinary Judge, as *Catulus*, in the Time of *Richard* the First; another, who, as it seems, was chief Secretary to the Chancellor, authorized for a special Purpose, to write the Patent of the Prince, as was *Sywardus*, whose Name was subscribed to a Charter of *Edward the Confessor*. *Ego Sywardus notarius*

was well enough applied, since in the Absence of the Chancellor the Keepership of the Seals had been often conferred upon him. But no farther, at present, is necessary to shew the original Institution of this Office by the Common Law; he was an Officer of early original, if not coeval with the Chancellor himself. The *Masters* come next in order to be considered.

We have premised a Supposition, that anciently there were twelve Clerks, attendant upon the *Chancery*, to write to the Seal, and make out Original Writs, called the *Brevia formata*, or *de Cursu*, because they were establish'd by Parliament, and are compiled as a Body of the Rules, and Principles of the Common Law, in the Book called the Register; these Writs being *de Cursu*, or of common Right, the Makers of them were called *Cursitors*, and these were called *Clerici de secundâ formâ*, in Opposition to the *Clerici de primâ formâ*, which are thought to be Officers of a less ancient Date. This Order of the Clerks *de primâ formâ* are said to begin, when, in

Pro-  
tarius ad vicem Rembaldi Reg' Magestar' Cancellar'  
hanc chartam scripsit & subscripsit. Jan. Angl. 128.  
Spelm. Gloss. 109.



Process of Time, new Cases sprung up, that required new Remedies, to which the Writs in the Register were thought not applicable; the Formation of new Writs became then necessary, in the Opinion of the ancient Lawyers, and these Sett of Clerks *de primâ forma* were established for that Purpose, perhaps about the Time of the Statute, 31 Edw. I. c. 23. which enacts, *Quotiescunq; de ceter' evenerit in Cancellaria quod in uno Casu reperit' brev' & in consimili casu (a) cadente, sub eodem Jure, & simili indigente remedio non reperitur breve. Concor-*  
*dent Clerici de Cancellaria in breve faciendo,*  
*vel atterminent quærentes in prox' Parlia-*  
*ment' & scribantur casus in quibus concordare*  
*non possunt, & de consensu Jurisperitor' fiat*  
*breve, ne contingat de cetero quod Cur' Dom'*  
*Regis deficiat conquerentibus in Justitia per-*  
*quirenda.* To this new Institution of Clerks,  
 ✓ *Fleta*, in his Book of the Laws of England,  
 wrote

(a) The Writ *de Ingressu in consimili casu*, and many others, were formed in Pursuance of this Act; and, perhaps, this further Use was made of these Clerks, *de primo gradu*, to write Writs for the Government; for a great deal of Business was done formerly this Way; the King's Commands and Injunctions were sent in the Form of Writs. *Fitz. N. Br. 31. 206. 2 Inst. 405. 8 Co. 48, 49.*

wrote in the following Reign, seems to refer, where, speaking of the Chancellor, he has these words, *Cui asscient' Clerici honesti circumspecti, Domino Regi Jurati, qui in legibus & consuetudinibus Anglicanis Notitiam habeant pleniorē; quorum Officium sit supplicationes & querelas conquerentium audire, & examinare, & eis debitum remedium exhibere, per brevia Regis,* where the Words *Notitiam habeant pleniorē,* seem to refer to the want of Skill and Learning in the old Clerks, for framing of the new Writs; and 'tis the more probable, since the *Brevia formata*, soon after this time, went into disuse. These Clerks *de prima forma*, or as sometimes they are called *de primo gradu*, and *majori gradu*, and *Magni Clerici*, were in Number 12. as appears from the following Record.

*Rex Omnibus, &c. Salutem, Volentes securitat' dilecti Clerici nostri Thomæ de Thallwall un' duodecim Clericor' in Cancell' nostra de primo gradu; whom, as 'tis recited, the Duke of Lancaster, the King's Son, had made Chancellor of the Dutchy. The Writ goes on, Concessimus quod gradus & locus ipsius Thomæ in Cancellar' nostra, tam in*  
D *absentia*

*absentia sua quam presentia, absq; detrimento seu prejudicio eorundem, quam diu ipse in obsequio dicti filij nostri, sic stare contigerit, integri & illesi permaneant. Et quod predict' Thomas Robas n'ras pro eodem gradu debitas & consuetas a Cancel' n'ra percipiet, & Locum suum per Clericum suum Deputand' in Hospitio ejusdm' Cancellar' in ipsius Thomæ absentia presterit, dum sic in obsequio d'ci filij n'ri continuet, prout ante hæc tempora in Casu consimili fieri consuevit, teste R. apud Westm. 28<sup>o</sup> die April' Anno R'ni n'ri 51. per Bre' de privato Sigil'* Thus it appears, these Clerks *de primo gradu* were twelve in number; they lived in the Chancellor's House, and had Robes of the King's Allowance: That the King frequently dispensed with their Attendance in *Chancery*, and allow'd 'em to make a Deputy. So *Henington*, a Clerk *de primo gradu*, was made Master of Rolls in *Ireland*, and was allowed to keep his Place in the *Chancery* of *England*, and had a Licence to make a Deputy; and sometimes the Clerks *de secundo gradu* were advanced to the first Form: And these Twelve are they who were in after-times, and at this Day are called *Masters in Chancery*;



cery; and at the Entrance to their Office take the following Oath :

“ Y E shall swear, that well and truly  
“ ye shall serve the King, our  
“ Sovereign Lord, and his People, in the  
“ Office of one of the Masters of his  
“ *Chancery*, to which ye be called. Ye  
“ shall not assent ne procure the disheri-  
“ tance, ne perpetual Damage of the  
“ King to your Power, ne Fraud ye  
“ shall not do, nor cause to be made  
“ wrongfully to any of his People, ne  
“ in any thing that toucheth the Seal.  
“ And lawfully, ye shall council in the  
“ Things that toucheth the King, when  
“ ye shall be thereunto required ; and  
“ the Council that ye shall give touching  
“ him, ye shall not disclose ; and that he  
“ know any thing of the Disheritance,  
“ or Damage of the King, or Fraud to  
“ be made upon any thing that toucheth  
“ the keeping of the Seale, ye shall put  
“ your lawful Power it to redress, amend,  
“ and if that ye cannot do, ye shall ad-  
“ vise the Chancellor or Lord-Keeper of  
“ the Seal, or other which may that a-  
D 2 “ mead

“ mend to your Power ; *As God you help.*  
Which is almost verbatim the same with  
the *Custos Rotulor*’

The Writs that were formed by the Clerks *de prima forma* were called (a) *Brevia Magistralia*, in Opposition to the *Brevia formata*; and, on Account of their Learning, they were called of latter Times *Magistri Cancellariæ*. If the Lord Chancellor, and these his Clerks, agreed in the Form of a Writ, that Form stood for a Law, and there was no (b) Reference to Parliament; but if they did not agree, then they were to resort thither, and therefore, either it happen’d by their Disagreement, or the Decay of Learning amongst them was probably the Cause, we find in the Law Books Writs, both of the original and judicial Kind, running in the

(a) *Jehu Webbs Case. Fleta l. 2. c. 12. Habet & Rex Clericos suos Prothonotarios in Officio illo, qui cum Clericis &c. Familiares Regis esse consueverunt, & precipue ad victum & vestitum, qui ad brevia scribend’ s’dum diversitat’ querelarum sunt Intitulati, & qui omnes pro victu & vestitu de proficuis sigilli in cujuscunque usus pervenerit debent honeste inveniri.*

(b) *Eg. Arg. on Postnat.*

the Stile of the Parliament: As the Writ of Wast begins, *Cum de Communi Concilio Regni*; another, *Cum in Parlamento nostro apud Northampton, &c.* But the Occasions of the *Brevia Magistralia* grew less and less.

And, indeed, there seems to me never to have been any great Occasion for them (a), for the Judges at this Time held themselves so strict and punctually to the Writs in the Register, that they would not suffer an old Writ to serve a new Case, although the Reason was the same, if there was the least Variance in Circumstances. Now the Judges gave Allowance to the ancient Forms of Writs, when the Substance and Reasons of a new Case fell under the old, and put the Plt' to his

D 3

Special

(a) 2 Inst. 407, 408. 8 Co. 49. Dy. 83. e. g. In the Writ of Assise of Darrein Presentment, which runs thus; *Quis advocatus tempore pacis presentavit ultimam personam que mortua est.* If an Usurpation was made on me when my Church became void by the Death of the Incumbent, I had this Writ; but if the Incumbent had resigned, and the Church became void by Resignation and not by Death, this Writ was not permitted to serve me against an Usurper, F. N. B. 31. 124.

Special Count, to exprefs the Circum-  
 ftance and Manner of it. The Chancellor  
 and his Clerks continued in the King's Pa-  
 lace, until about the 4th (a) of *Edw. III.*  
 at which Time it is fupposed that Court,  
 and the King's Bench, became refident at  
*Westminster*: They were commonly called  
 Court Lawyers, and Purveyance was speci-  
 ally made for them by Parliament, as a part  
 of the King's Houfhould, until *An. 4to* of  
 that King, and then all further Purveyance  
 (b) was prohibited to be made for them:  
 About which Time, the Chancellor and  
 the Society of Clerks were fevered, and or-  
 dered away from the Court, on certain po-  
 litick Confiderations. The Conjecture  
 ftands thus; They left the King's Palace  
 when their Purveyance was to ceafe, which  
 had alfo the Effect of fixing the Court in  
*Westminster-Hall.* (c) After their Departure  
 from

(a) *V. Rot. Pat. 10. E. 3. Pars 2. M. 20. 2 E. 3.  
 p. 1. M. 33. 10 Co. 73.*

(b) Purveyance was a Provision made and levied  
 for the King and his Houfhould on the Subject; a  
 Grievance much complained of in After-time, and  
 now taken away.

(c) Some think this Court, and the King's Bench  
 were

from the King's Court, the Chancellor had a House provided for him at the Expence of the Crown, where all the Clerks of the *Chancery*, during the said Reign of *E. III.* (according to *Sir Robert Cotton*) had their Diet, Apparel, and Allowances continued to them; and, as I believe, sometimes in a separate House, called the *Hospit' Cancellar'* (a) as the Chancellor thought convenient; and

were fixed in *Westminster-Hall*, (*prout 10 Co. 73.*) at one time, viz. in the 4th of *E. 3.* which I think is a Mistake, for *A. 8.* of the King, it was Enacted, That the King's Bench should stay in *Warwick-shire* after *Easter* next, for that *Jeoffry le Scroop*, Chief Justice, is very busy in the King's weighty Affairs, whose Place to supply *Sir Richard Willoughby* is appointed, and *Sir William Sharshull* is assigned with him, one of the Justices of the King's Bench, *Pryn Coll. 16.*

(a). The *Hospitium Cancellaria* was the publick Office where the Clerks had their Stalls or Places, which they got Licence from the King to hold, when they were employ'd Abroad; perhaps the Chancery-Office is sprung from it:

*Claus' A. 41. E. 3.* there is a Writ to *Ravenfore*, the Clerk of the *Hanaper*, to pay the Clerks, *de prima formâ*, several Sums of Money to buy a Barge, and for a Man to take Care of it, as also to keep it in Repair, *pro passagio suo* (as the King there says) *ultra Aquam Thamesia ad Mandatum Simon Archiep' Cantuar'*



venient; and at last a Regulation was made of them, and they were divided between the Chancellor and Keeper of the Rolls, *viz.* the Clerks then or since called the Six Clerks, the Clerks of the Petty Bag, and the Examiner of Patents were assigned to the Clerk of the Rolls; the Clerks, *de prima forma*, of whom only 'tis our Intention to speak, and the rest, remained with the Chancellor.

By the special Appointment of Parliament these twelve Clerks, or Masters, were made Coadjutors with the Chancellor, and had equal Authority with him in the forming the *Brevia Magistralia*; for unless they all agreed, they were to go to Parliament. But this I say, was by special Appointment, for in all other Cases, by the Constitution of the Court, they are Assistants to, or, as they were properly stiled, the Council of the Chancellor, for which we have this remarkable Record.

The

*Cantuar' Cancellarij nostri de Lambeth; ubi Hospitium Cancellarij nostri jam tenetur.*

*Claus' 19. E. 3. Memorandum qd' Cancellarius & Clerici sui teneant Hospitium suum in Domibus Hospital' vocat' Meafon Dieu apud Dover, quando Rex ibid' memoram fecerit.*

(a) The Abbot of *St. James* by *Northampton*, 12<sup>o</sup> E. II<sup>d</sup>. was summoned to a Parliament at *York*; he causes Search to be made, whether he was summoned *per simplex brev'* or *per Reg'rum Cancellariæ*; and finding it by the latter, he applied to *William de Ayre* the Clerk of the Rolls, (b) to have his Name struck off the Roll, but the Clerk refused him; so he exhibits his Bill to the Lord Chancellor, *John Hotham*, Bishop of *Ely*, and complained, that his name was enrolled in the *Chancery* to be summoned to Parliament; whereas he alleged, he held not *per Baroniam*, and that neither he nor his Predecessors were ever summoned before: Whereupon this Decree was made, *D'nus Cancellarius cum suo Consilio Ordinavit, quod nomen predict' Abbatis a Reg'ro Cancellar' deleteretur*. This Council of the Chancellor, or Clerks, sign this Decree, viz. the Clerk of the Rolls first.

Upon

(a) *Selden. Epist. ad August. Vincent. l. v. 1696.*

(b) The Parliament were anciently called over by the Roll, or Register, in the *Chancery*, v. *Cott. Records.*

Upon which a learned Author, more than once mentioned, infers, and very justly, that these (a) Clerks act as Council, or Assistants, to the Chancellor : 2dly, That the Chancellor is the only Judge here, and pronounces the Order *CANCELLAR' cum suo Consilio ORDINAVIT*; in which the Masters had no judicial Voice, unlike what it is in other Courts, there the Justices are Cojudices with the Chief Judge, and have Places and Voices with him (b). The

(a) *Fleta*, speaking of them, says, *Collaterales & Socij Cancellarij esse dicuntur.*

(b) *A. 12. R. 2.* Certain Orders were made for the Regulation of the Court, by the unanimous and joint Consent of all the Clerks *de primâ formâ*; they run thus, *Ordinatum est per Dom' Canc' Angl' & per duodecim Clericos, de primâ formâ*, &c. by which it is ordained, that the *Custos Rotulorum*, who before had only 3 Clerks, by Reason of the Encrease of Business, should now have added to him three more Clerks to write in the Rolls. Which I suppose, is the Origin of the Six Clerks.

*Item*, The rest of the Clerks, *de primâ formâ*, should have three Clerks; provided none of them should be married; which Provision was also made Relation to the said six Clerks.

*Item*, the said twelve Clerks should live together in one House, or separately, but not among the Clerks of inferior Order, *propter Honestatem Honoris, & Gradus eorundem*, under Pain of Expulsion.

*Item*,

The Business of writing and framing Writs continued not long; and although they kept their Places and Pensions in *Chancery*, as Clerks, yet they were so small, that they sought out for other Employments, and were provided for in different Ways; some preferred to \*Benefices, some to be Clerks of the *Hanaper*, *Thetwall* to the Chancellorship of the Dutchy; *Hemmington* was made Master of the Rolls in *Ireland*; some of them again frequently appointed *Custodes Sigilli*; and until Queen *Elizabeth's* Time had nothing to do but about the Business of the Seal, in the Course of the Court, according to the Common Law,

*Item*, The Clerks, *secundâ Formâ*, who dwelt not in the House of the *Custos Rotulorum*, should live together, or separately, but not mix with the lesser Clerks, for the same Reason.

*Item*, Three of the Clerks, *de primâ Formâ*, shall attend the Court every Term, as antiently.

*Item*, For the future, there should be twenty-four Cusitors.

\**Item*, By the antient Constitution of the Court, it belonged to the Chancellor to present the Chancery-Clerks to the King's Churches, not exceeding 20 Marks in Value; then, after this Recital, 'tis added, May it please the King, to confirm the said antient Right or Usage for the Time to come.

Law, in which they were grown so ignorant, (a) that in Queen *Mary's* Time a Bill was preferred to reform them; which because it contains a good deal of History concerning these Matters, there needs no Excuse to set it down, as I had it from a very learned and honourable Gentleman.

*To the Right Reverend Father in God Stephen Bishop of Winchester, and Lord Chancellor of England.*

“ I N most humble wise sheweth unto  
 “ your good Lordship, your daily Ora-  
 “ tor, *John Baron*, the oldest Councillor  
 “ now remaining in this honourable Court  
 “ of *Chancery*, that whereas till now of late  
 “ Days, the greatest Number of the Masters  
 “ in *Chancery* were, from their Youth,  
 “ brought up in the said Court, which had  
 “ not only perfect Knowledge in the Course  
 “ of

(a) They lost their Learning in the Laws, and came to be Men of another Profession. The Chancellor took Advantage of their Leisure, and referred



“ of the said Court, but also were expert  
“ in all kind of Writs, as well original as  
“ judicial, contained in the Register, and  
“ other Books, at which Time no Writ  
“ did pass the Seal, until such Time as it  
“ was examined whether it was true and  
“ agreeable to the Register, and also in  
“ true Course, and fair written, it was  
“ then plied up by the said Master, and put  
“ into the Ply-Bag; and when all the  
“ Writs were so examined, and put into  
“ the said Bag, if my Lord Chancel-  
“ lor did not seal at that Time, then the  
“ said Bag was sealed up with the Seal  
“ of the Master of the Rolls, for the Time  
“ being, if he were there then present;  
“ and in his Absence, with the Seal of the  
“ most antient Master, then being present;  
“ and so sealed, delivered to the Clerk of  
“ the Hanaper, or his Deputy, for the  
“ Time being, who had the Custody there-  
“ of until such Time as the Lord Chan-  
“ cellor, or the Keeper of the Great Seal,  
“ for the Time being, did seal; so that then  
E “ no

red the Examination of Causes to them, of which  
new Employment the People at that Time com-  
plained, *Pract. of Ch.* 69, 70. *v. Stat.* 1 *Jac.* c. 10.

“ no Writ did pass the Seal, except it  
“ were true, and in course, and also fair  
“ written, but was rejected and put back  
“ from the Seal: By Means whereof the  
“ Youth, then being in the Court, did  
“ not only practise to write fair, but also  
“ studied, and applied their whole Mind  
“ to have Knowledge and Cunning, with-  
“ out which they were at that Time fully  
“ perswaded not to come to any Promo-  
“ tion in the said Court, nor yet to be  
“ any Gainer; for at that Time, none of  
“ the Masters of the *Chancery*’s Clerks,  
“ nor none of any of the other Officer’s  
“ Clerks of the said Court, (the Master  
“ of the Rolls’s Clerk only excepted) had  
“ the whole Profits of any kind of Writs  
“ coming to their Hands; and, saving  
“ Three-Penny Writs, and Six-Penny  
“ Writs, until such Time as for his Cun-  
“ ning and long Continuance in the  
“ Court, he should be habled by the  
“ whole Court to be a Curfitor, and  
“ make Writs and Process in his own  
“ Name; and so being habled by the most  
“ ancient Master of the *Chancery* then  
“ present, he was presented to the Master  
“ of

“ of the Rolls, for the Time being ; and  
“ then the Master of the Rolls admit-  
“ ted him, and gave him his Oath,  
“ which was then great Encouraging to  
“ the Youth in the said Court, to apply  
“ themselves to get Knowledge and Cun-  
“ ning, without which they know per-  
“ fectly they would be no Gainers, nor  
“ admitted to be a Curfitor, nor to be  
“ One of the Master of the Rolls his  
“ Clerks ; for at that Time the Master  
“ of the Rolls would receive none to be  
“ his Clerks, to have Course to the Re-  
“ cords, but such as he should be per-  
“ swaded by the Officers of the said Court,  
“ to be of a long Continuance, and also  
“ of the most Knowledge in the Court,  
“ (except Officers) being in Gift of the  
“ Master of the Rolls : The eldest Clerk  
“ of the Master of the Rolls’s Clerks was  
“ preferr’d to the said Office. And now  
“ at this present Time there is not one  
“ of the Masters of *Chancery* (Mr. *Croke*  
“ only excepted, who now discontinueth,  
“ and cometh seldom there, the more Pity  
“ is) which hath been brought up in  
“ *Chancery*, and hath Knowledge in all

“ Kind of Writs ; and, although the Re-  
“ fidue of the Masters in *Chancery* be of  
“ much Worship, and the greatest Num-  
“ ber of them very well learned in the  
“ Civil Law, yet for that they have not  
“ the Knowledge of the Course and Na-  
“ ture of Writs, contained in the Regi-  
“ ster, they suffer their Clerks, which  
“ write in their Names, to have the whole  
“ Profits of all Kind of Writs, and other  
“ Things, coming to their Hands, by  
“ Reason thereof; whereas then the Ma-  
“ sters had the Profits of all Things  
“ coming to their Hands, except Three-  
“ Penny Writs, and Six-Penny Writs, as  
“ is before said : They studied, and ap-  
“ ply’d their Minds to have Cunning and  
“ Knowledge : Now, their daily Study  
“ and Policy is, without Knowledge, by  
“ all Means possible, as well by themselves  
“ as by other their Friends and Acquain-  
“ tance, to procure other Men’s Clients  
“ from them ; and divers of them, to at-  
“ tain their Purpose, will compound with  
“ an Attorney at the Common Law, to  
“ give him the Moiety of the Fees of as  
“ many Writs as he shall bring to his  
Hands ;

“ Hands ; and some of them will not  
“ stick to give three Parts of his Fees to  
“ the Attorney, and content himself with  
“ one Part ; so that now for lack of Ma-  
“ sters in the *Chancery*, which ought to  
“ examine the Writs, every Chancery-  
“ Man, as well the Ignorant as the other,  
“ plieth his own Writs, and putteth them  
“ to the Seal, without further Examina-  
“ tion ; by Reason whereof, divers of  
“ them, many times, being ignorant, put  
“ to the Seal some Writs which ought  
“ to pay Fine to the Queen’s Majesty, and  
“ also some other Writs which ought to  
“ pay a Fine to the Lord Chancellor, and  
“ the Master of the Rolls, without pay-  
“ ing any Fine at all : By means whereof,  
“ it is come to pass, that a young Chan-  
“ cery-Man, being but of little Continu-  
“ ance, and less Knowledge, doth make  
“ and marr more Writs in a Term, than  
“ an old Chancery-Man, having Know-  
“ ledge, doth make in an whole Year.  
“ May it therefore please your good Lord-  
“ ship, That, for as much as the Court is  
“ now so far out of order, it may be  
“ brought to pass, by your Wisdom and



“ Policy, that the Youth in the Court  
“ may be compelled to have Knowledge,  
“ before they have the whole Profits of  
“ Things coming to their Hands, which  
“ do pass the Seal; which if by your  
“ good Lordship’s Wisdom and Policy  
“ shall be brought to pass, you shall not  
“ only do acceptable Service to the  
“ Queen’s Majesty and the Common-  
“ Wealth, but also be an Occasion that  
“ the Court of *Chancery*, within a short  
“ Time, shall flourish in Knowledge,  
“ better than it hath done any Time with-  
“ in this Forty and Four Years past; and  
“ your said Orator shall daily pray, &c.

I suppose Counsellor *Baron* was a Master in *Chancery*. The Term Counsellor, I think, was not yet apply’d to Gentlemen of the Long Robe. These in this Age went under the Name of *Apprentices*; afterwards *Barristers*, and *Serjeants*; and he appears to have Learning enough to know, that Counsellor was a proper Appellation for a Master in *Chancery*. Now to close up what I intend to offer at present, concerning the Masters, I observe

serve, that it is in the Respect that they are Counsellors or Assistants to the Chancellor, that they have the Honour to sit upon the Bench with him in open Court; and it is in that respect, I suppose, they claim Precedency of Serjeants at Law, which Sir *Edward Coke* is pleased to determine against them; and as formerly they were Members of the King's Court, they attend the House of Lords; claim, and have a Right to assist at the Coronation of our Kings.

I have now done with the Common Law Constitution of the Court, intended to be spoken of; and having before taken Notice how the Court of Equity became joyn'd or annex'd to the other Common Law Court of the *Chancery*, by turning over to the Chancellor, the ordinary Judge, in process of Time, the sole hearing of Petitions and Suits made to the King himself: I there broke off the Continuation of what I had further to add concerning it, as a Court of Equity, with an Intent to resume it in this Place, as more orderly for my Purpose, to shew the judicial Authority and Power it is intrusted with.

The

The Commencement of the Chancellor's equitable Authority, by what has before been anticipated, is untraceable, and has Prescription for its Parent: But when his Jurisdiction began to body out into something like a Court, we may make some Judgment from that which follows; and by observing the Progress it made in Business and Power, judge better of the Use of the Masters therein, what Functions they held, and the Grounds and Reasons on which their Rights do depend.

Some have said there was a settled Court of Equity held by the Chancellor alone, at the Time of the Statute 28 E. I. which ordains, That the Chancellor and Justices shall follow the King, to the Intent, that he might always have Men learned in the Laws near at hand, to assist him in Administration of Justice: For we are inform'd, that in the First of this King, the Chancellor sat in *Cur' Cancellar'* associated with many Peers, hearing a Matter concerning *Windfor Forest*. And Sir H. Spelman says, *Sub hoc Seculo Solus cognoverit Causas*. If Sir Henry means, that he heard Causes, as an ordinary Judge  
in

in the Common Law Court, (a) 'tis right; but if as a sole Judge of Equity by Petition, Sir *Edward Coke* is against him, and holds that the Chancellor had then no Court of Equity; and indeed the very Statute itself is a Proof of it; but it is only a Court of Record of ordinary Jurisdiction, according to the Course of the Common Law. And Mr. *Lambert*, who was a great Searcher of Antiquities and Records in the Tower, of which he had the Keeping, and also a learned Man, and a Master in *Chancery*, in his Treatise of the Jurisdiction of Courts, says, he could not find that the Chancellor had any Court of Equity before the Time of *Henry* the IVth. in whose Days, by Reason of the intestine Troubles, Feofments to Uses did first begin, as some think, or else did first grow common and familiar. It is certain, no Notice is taken of

(a) 14 E. 1. *Robert Burnell*, Bilhop of *Bath*, was both Chancellor and Chief Justice. And it is said, that the *Chancery* and *King's Bench* were but one Place. *Spelm.* 2 Inst. 552. v. 10. E. 3. and 47 E. 3. So *Finchden*, Chief Justice of the *Common-Pleas*, says, he will advise with the Chancellor and Justices of the *King's-Bench*.

of it, as a Court of Equity, by our Books, until the Reign of *H. VI.* and it is not to be expected there should, since Lord *Elfmere* himself says, and so the Truth is, there is no Record of Proceedings, by way of Petition, or *English* Bill, before that Time, to be found in the Office of Records : But Records, Reports, and Cases, are plentiful enough, in its ordinary Jurisdiction, long before.

Some conjecture, that this Court of Equity began under Cardinal *Beauford*, that was Son of *John of Gaunt*, and Bishop of *Winchester*, in the Reign of *H. V.* and encreased in Cardinal *Kimp's* Time, who was Chancellor 28 *H. VI.* but most of all in Cardinal *Wolsey's* Time, from the 8th to the 21st of *H. VIII.* Others have thought that the Chancellor was made sole Judge in this Court, as a Court of Equity, in the 36 of *E. III.* By which it is enacted, that if any Man think himself aggrieved, contrary to the Articles of that Parliament, or any others, contained in divers Statutes, will come to the *Chancery*, and there make his Complaint, he shall there presently have Remedy, by Force of the said Articles.



Articles and Statutes, without elsewhere pursuing to have Remedy.

But altho' my Lord *Coke* is of Opinion that no equitable Jurisdiction was thereby given, yet there are those who differ from him, in that respect, because the Words of the Act, *Without elsewhere pursuing to have Remedy*, confines the Remedy to this Court. These Words, *Without elsewhere pursuing to have Remedy*, in their Opinion, exclude all other Jurisdiction whatsoever. However, it can't be deny'd, that it enlarged the Power of the Chancellor. 2 *E. III.* In *Theoband de Veron's* Case, in a Case of Livery, which concerned his ordinary Power, the Chancellor indeed, in that Case, said, that the *Chancery* was a Court of Equity, where we grant a Writ to every Man that comes to demand his Heritage, according to that which is found by Office: Yet there are those who will not allow it to be a Court of Equity, in the known Extent and Signification of the Word. All Courts, say they, are Courts of Equity, to administer Justice, according to the Course of the Common Law.

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In this Reign, according to my Lord *Coke*, there were few Petitions or Causes. It is celebrated for having the wisest Lawyers that ever were. The Laws were in their Ascendant; and Causes were learnedly and justly managed by their Skill in *good Pleading*: (The greatest Honour and Ornament of the Law, says Sir *Edward Coke*,) which always prevents *Chancery Suits*, as the (a) Neglect and Ignorance of it has been observed to breed them. Personal Estates were then small Accounts: That swelling Title of the Court in these latter Ages, were wholly managed at Law. According to the Writ in the Register, Uses and Trusts were, as I think, not yet in being. (b) The Parliament exercised an Absolute

(a) 21 E. 4. 23. If Counsellors would be good Pleaders, there would not be so many *Subpœna's* try'd in Chancery; for divers of those Chancery Matters might be turned into Actions on the Case.

(b) Actions were usual in Parliament. *Vide Book of Pleas in Parliament*, at the Tower. Fol. 44. Matters of Absolute Jurisdiction seem to be very commonly determined there. The Petitions against Extortion, Fraud, and Arbitrary Proceedings, are numerous. Petition of *Magdolphus*, Earl of *Fife*, against *John*, King of *Scotland*, for forcibly taking

Absolute Jurisdiction; for when a Matter was against Reason and Conscience, and the Party had no Remedy by Common Law, it was usual to sue for Remedy in Parliament, that was holden of Course twice every Year. All Matters of Difficulty were adjourn'd likewise to the Parliament, from inferior Courts. The Court call'd *The King's Council*, exercised an unlimited Power, and sufficiently accounts for the Silence of the Law Books, and Records, before the Reign of *H. VI.*

And therefore, altho' the Chancellor is suppos'd to be settled in *Westminster-Hall*, in this Reign, yet he had no settled Business in his Court, as a Court of Equity, but only as a Court of Common Law; for People yet continu'd to follow the King with Petitions, which grew frivolous, and vexatious, to that Degree, that the Parliament took Notice of them, and enacted, That all who make such Suggestions be sent before the Chancellor and Treasurer,

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and

taking away his Possessions in the County of *Fife*; and a *Scire Facias* was awarded to the Sheriff of *Northumberland*, to warn the said King of *Scotland* to appear in Parliament, and he did appear,

and the great Council, to find Surety to pursue their Suits with Effect, or to suffer such Punishment as the Defendant should have suffer'd, in case the Suggestion had been true, and found for the Plaintiff. This Act has been expounded to be meant of the Chancellor in the Chancery alone, as 'tis said, and yet the Petitions were indorsed to the Arch-bishop, and Council, calling to them the Chancellor; but I imagine both Chancellor and Council had Cognizance of these Suits, of which more by and by. I mention this because here is the Countenance of an Act of Parliament to the Chancellor for his hearing Petitions in an absolute or equitable Course: But that which formed it into the Strength of a Real Court, and gave it Consistency, Discipline, and Order, was the Act of Parliament that enabled the Chancellor to award Costs to the Parties grieved, by vexatious Complaints: "When People are  
"compelled to come before the King's  
"Council, or in the Chancery, by Writ,  
"grounded upon untrue Surmises, the  
"Chancellor for the Time being, after such  
"Suggestions are duly found and proved  
untrue,

“untrue, shall have Power to ordain and  
“award Damages, according to his Discre-  
“tion.” Now it may be said, and not till  
now, to be properly a Court of absolute  
Power, in that Sense we use the Word,  
when we speak of it; for in Times pre-  
ceeding this Act, it had not a Power to give  
Costs; it was therefore no Court of ab-  
solute Power, but a restrained, limited  
Authority, that could do no more than  
decide Petitions, and Controversies, as an  
Arbitrator, by examining and trying the  
naked Right and Verity of the Case, and  
to determine the Right; the Chancellor’s  
Authority extended no farther; of whose  
Proceedings no Entry or Records were  
at this Time made: Doubtless without a  
Power to give Costs, it could scarce have  
any Appearance, much less any Vigour of  
a Court of Equity. Yet notwithstanding  
it but now obtain’d the Support and  
Countenance of the Act of Parliament,  
yet it had been drudging for Power and  
Jurisdiction some Time before, by taking  
upon it to determine of Freehold, and  
Matters determinable by Common Law.  
The Commons were in some Fright about



it in the Time of *Edw. III.* and got it restrain'd; so harsh was the Sound of arbitrary Power in the Ears of our Ancestors. In the 13th of this King *the Commons petition'd*, that neither the *Chancellor*, nor *other Councillor*, do make any Order against *the Common Law*, nor that any Judgment be given without due Process of Law; and in the same Parliament they *petition'd again*, that no Person should appear upon the Writ of *Subpœna de quibusdam certis de causis*, (a) before the Chancellor, or any other

(a) *Pet. Parl. Anno 3 H. 5. Art. 46*, that the *Subpœna de quibusdam certis de causis*, was never used nor granted before the Time of *R. 2.* when *John Waltham*, late Bishop of *Sarum*, and then Master of the Rolls, by his Subtilty, caus'd to be found out, and begun, and are contrary to the Form of the Common Law.

That they are a Loss and Hindrance of the Profits which should arise to the King by the Fees, Fines, Issues, Amerciaments, and other Profits, in other Courts, if such Matters were su'd and determin'd by the Common Law; because no Profit ariseth by the *Subpœna*, but only Six-pence for the Seal; and pray that the Party grieved by such Writ may have an Action of Debt for 40 l. against the Pursuers of such Writs, when the Matters are deter-

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other of the Council, where Recovery is given by the Common Law; but nothing was done upon these Petitions; and four Years after came this Statute of Costs to enlarge its Authority.

After this the Court grew into Esteem and more Business, by the intestine Broils that soon after follow'd between the Houses of York and Lancaster; the Partisans of each knew their Estates would certainly fall a Morfel to the prevailing House; the Unfortunate were sure to be call'd Rebels and Traytors; so many put their Land secretly into Use, (a) to secure  
F 3 their

minable by the Common Law; and if it appear to the Court that the Matter is determinable at Law, then the Pursuer of such Writ to be condemn'd in the Sum of 40*l*.

*Pet. Parl. 1 H. 6.* A Petition, no Man to be call'd by Privy Seal or *Subpœna* to answer a Matter determinable at Law, and that to appear by the Testimony of two Justices of either Bench, and the Plaintiff to find Surety to prosecute with Effect, which pass'd into a Law, 15 H. 6.

(a) They convey'd their Land to their Friends in Trust, to be return'd or re-convey'd at the End of the War; and many of these Trustees would refuse to re-convey, whereupon the Party wrong'd had his Relief by *Subpœna* in Chancery. *Vide Spelm. Verbo Cancellarius.*

their Possessions against the Event of that doubtful Combat; whereupon Frauds and Breaches of Trust did ensue, and Suits for Relief: It had likewise its *Cardinal Protectors*, and pass'd through the Hands of the *Grandees* of Religion, who by the Ages wherein they liv'd, were the Persons only *thought on and regarded*, and left to aggrandize themselves and their Offices as they pleas'd.

When *Wolsey* enter'd the Scene, about the 8th of *H. VIII.* and for many Years together, it was, (a) *Down* with the Common

(a) The 20th Art. of Impeachment against *Wolsey*, That he had examin'd divers and many Matters in the Chancery, after Judgment thereof given at the Common Law, and made some Persons restore again to the other Party condemn'd, that they had in Execution, by Virtue of the Judgment at the Common Law. *Article 21.* That he had granted many Injunctions by Writ, and the Parties never call'd thereunto, nor Bill put in against them, and by reason thereof divers of your Subjects have been put from the lawful Possessions of their Lands and Tenements; and by such Means he hath brought the more Party of the Suitors of the Realm before himself, whereby he, and divers of his Servants, have gotten much Riches, and your Subjects suffer'd great Wrongs. *Article 26.* That  
when

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Common Law, and Judgments given in the King's Courts: *Down* with Acts of Parliament, (a) *Latitats Latitare*: The (b) Judges *duck* their *reverend Heads* to his Eminence as he pass'd by; he cut and shap'd out four *Under-Courts* for his Creatures, and provided them with the King's Commission; one was kept at *White-Hall*; the Second before the King's Almoner, Dr.

when Matters have been near at Judgment by Process at the Common Law, he not only gave and sent Injunctions to the Parties, but also sent for the Judges expressly by Threats, commanding them to defer the Judgment, to the evident Subversion of the Laws.

(a) A vaunting Expression us'd by a Chief Justice of the Common Pleas, with Respect to the *King's Bench*. *Vide* the Lord Chancellor's Speech to Sir Henry Montague.

(b) In a Law Manuscript that I have of Queen Elizabeth's Time, the *Common Pleas* sent to the *King's Bench* to know whether they should move their Caps to the Lord Mayor of London? Kemp was then Secondary, and an old Man, and the Court ask'd his Opinion: He answer'd, He thought not; that his Uncle was an Officer of the Court in Henry the 7th's Time, and that he had heard his Uncle say, the Judges did not move to the Chancellor before my Lord Cardinal *Wolsey's* Time, who carried himself higher than any of his Predecessors.

Dr. *Stokesly*, afterwards Bishop of *London*; the Third in the Lord Treasurer's Chamber; the Fourth at the Rolls in the Afternoon, before the famous Dr. *Cuthbert Tonsall*, as I judge, because he was Master of the Rolls in that Year: And even after *Wolsey's* Fall, in a more moderate Time, when less Countenance was due, when *Wolsey's* Excesses were yet fresh, (a) Serjeant *Devistal* arguing before the Chancellor against his Jurisdiction in a particular Point, saying, That the Court could not reverse an absolute Decree made by itself, and compar'd it to a definitive Sentence in the Spiritual Court, which can't be redress'd but by Application to an higher Judicature. (b) The *Secretary of State* being then present, had the Insolence to interrupt him, and bid him *speake no more of the Authority of the Court*.

The mention of this Passage serves also to put me in Mind not to go beyond the Compass I set myself, which is not to consider

(a) *Elfm.* 62. It seems as if Serjeants at Law by their Oath ought not to be of Council with any Plaintiff in the Court of Equity in Chancery.

(b) In *Cancellaria*, 27 H. 8. 16.



consider the Authority of the Court in its Extent, but only to enquire where its whole judicial Power does reside.

It was also my Purpose not to enter into a Detail or exact Enumeration of all the *Rights of the Masters*, such as their Privilege to be su'd only in their own Court, their Fees, Perquisites, Sallaries, &c. many of which are of a modern Date, but only to shew the Original of their Institution, how anciently consider'd and employ'd, (of which some farther Notice will be taken by and by) and how from being Ministers of the Common Law Side of the Court, they came to be wholly turn'd over and apply'd to the more profitable Service in our Court of Equity. What therefore I have further to offer will wholly be consider'd under the Form of this Question:

*Whether the Master of the Rolls has any Right judicially to hear Causes in the Court of Chancery, in the Absence of the Chancellor, by Prescription, or by the Constitution of the Court?*

In

In which I shall be often oblig'd to speak of the Masters in Chancery, in Regard to their Occupations in that Court, as they lye combin'd and intermix'd.

We may throw out of the Question the Legal or Ordinary Court, that is, Part of the Chancery which has been observ'd to hold Pleaby *Latin* Bill, according to the Course of the Common Law: Here the Chancellor is sole Judge, and sits free and clear of all Claims of Jurisdiction with him; but we may remember that the twelve Masters are constituent Parts of this Court, as the Chancellor's *Council* or *Assistants*; and as such he has a Right to demand their Assistance, when there is Occasion; which implies an Obligation to attend and give it. Here if a *Scire facias* be brought to reverse the *Patent* of any Officer whatsoever, for Breach of Duty, or any other Cause, the Chancellor gives Judgment for affirming or reversing it. Here the Master of the Rolls claims no judicial Voice by the Constitution of the Court, no more than the other Masters, and yet this is far the more ancient Court; but from the elder Stock  
no

no Prescription has sprung that might yield one seemingly of a more natural Growth.

And as to the other more modern Court of Equity, I know not what to argue, I confess, to support a Prescription in that before *H. VI.* in regard all the Times beyond him are almost pure Blank and Space, with respect to the Manner in which the Jurisdiction of the Court was exercis'd; there is not the least Tittle of written Evidence concerning the judicial Power of the Court, but what relates only to the Chancellor; concerning whom there are such Traces, from which probably some Reasons arise to conclude, that Suits by Petition, or *English* Bill, were decided by the *Chancellor*, and the *King's Council* in his *Absence*, and that none were, or well could be, determin'd by the *Master of the Rolls*. Previous to which we shall set down an Account or Catalogue of the *Masters of the Rolls*, then shew their Importance and Regard in the Common Law Side of the Court, to whom the *Masters* were often join'd; and when we come to consider what Station the Master of the Rolls might formerly have under the Administration

ministration of the Equity-Court, take in every *Instance* we can find that gives any Colour or Countenance to the *affirmative Part of the Question*.

## Tempore E. I.

- 23 E. 1. *Adam de Osgodby*, Constitut.  
per *J. de Langton* Cancellar.  
Regis 1 Octob. Claus. 23.  
E. 1. m. in dorso.
- 10 E. 2. (a) *William de Ayremine*, cum  
Assensu Cancellarij Custod.  
Rot. Commisa fuit.
- 17 E. 2. *Richard de Ayremine*, Claus. 10  
E. 2. in dorso. m. 28.
- 18 E. 2. *Henry de Cliffe*, Const. 4 Julii  
pat. 18 E. 2. p. 2. in dorso  
m. 1. 1 E. 3.

(a) The three first named were Clerks of the Chancery; the two *Ayremine*s were nominated to the Office by the Chancellor; *William de Ayremine* was sworn into his Office in the Chancellor's Chamber in the Abby of St. Mary in York. *Richard de Ayremine*, whose Name is omitted in *Dugdale's Orig' Juridicial'* was sworn in *Hospitio Cancellarij*, perhaps *Cancellarie* is the better reading, in domibus Comitis Richmond, juxta Ecclesiam Sancti Pauli, as the Record has it, in the Presence of *Henry de Cliffe*, afterwards Chancellor, *William de Herlaston*, *Adam de Brun*, and others, all Clerks of the Chancery.

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- 1 E. 3. *Henry de Cliffe*, who with *Harleston* were made *Custodes Siggilli*; some say that *Cliffe* was also Chancellor.
- 8 E. 3. *Michael de Worth*, by some call'd *Watch*, who was stiled *Clericus de precepto Magistri Cliffe*, the same before nam'd, Const. 20 Jan. 8 E. 3. in dorso. m. 35.
- 11 E. 3. *John de St. Paul*, 18 Apr. Claus. 11 E. 3. m. 13.
- 14 E. 3. *Thomas de Evesham*, Const. Claus. 14 E. 3. p. 2. m. 9. in dorso.
- 15 E. 3. Master *John de Thoresby*, Clerk. Const. 21 Feb. Claus. 15 E. 3. p. 1. m. 34. in dorso. He was after Keeper of the Privy-Seal, Chancellor, Bishop of *St. David's, Worcester*, and at last Archbishop of *York*.
- 36 E. 3. *David de Waller*, Const. 15 Martij Claus. 36. E. 3.
- 45 E. 3. *William de Burstall*, Const. 28 Martij Claus. 45 E. 3. in whose Time the *Domus Conversor* was granted for keeping of the Rolls.



- 5 R. 2. *John de Waltham*, Const. 8. Sept. pat. 5 R. 2. p. 1. m. 23. after Bishop of *Sarum*, and Lord Treasurer, who invented the Writ of Subpœna in Chancery.
- 10 R. 2. *John de Burton*, Clerk, Const. 24. Oct. pat. 10 R. 2. p. 1. m. 18.
- 18 R. 2. *John de Scarle*, Clerk, Const. 22 July, pat. 18. R. 2. p. 1. m. 28.
- 21 R. 2. *Thomas Stanley*, Clerk, Const. 11 Sept. Claus. 21 R. 2. p. 1. m. 26.
- 3 H. 4. *Nicholas Bubwith*, some say *Burwich*, 24 Sept. 3 H. 4. p. 2. m. 3.
- 6 H. 4. *John Wakering*, Clerk, Const. 2 Martij, pat. 6 H. 4. p. 1. m. 14. after Bishop of *Norwich*, and Chancellor for about a Month.
- 3 H. 5. *Simon Garnstead*, Clerk, Const. 3 Junij, pat. 3 H. 5. p. 1. m. 7. who is said to be made *per Allocatio Thesaurar' & Baron' de Scaccar'* Claus. Anno 4 H. 5.
- 2 H. 6.

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- 2 H. 6. *John Frank*, Clerk, Archdeacon of *Suffolk*, Const. 28 Oct. pat. 2 H. 6. p. 1. m. 31.
- 17 H. 6. *John Stoppenden*, Clerk, Const. 13 Nov. pat. 17. H. 6. p. 1. m. 31.
- 25 H. 6. *Thomas Kirkby*, Const. in reversione 29 Martij pat. 25. H. 6. p. 1. m. 7.
- 31 H. 6. *Telverton* and *Kirkby*, joynt-Clerks, *Statbam* Subpoena.
- 49 H. 6. *William Morland*, Clerk, Const. 12 Feb. pat. 49 H. 6.
- 1 E. 4. *Robert de Kirkham*, Const. 23 Dec. pat. 1 E. 4. p. 3. m. 15.
- 1 E. 4. *John Alcock* legum Doct' Const. 29 April. pat. 1 E. 4. p. 1. m. 28. after Bishop of *Worcester* and *Ely*.
- 12 E. 4. *John Morton*, Clerk, Const. 16 Martij pat. 12. E. 4. p. 1. m. 15.
- 15 E. 4. *Magist' John Morton*, Const. 2. Maij. pat. 15. E. 4. p. 1. m. 9.

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18 E. 4. *Robert Morton*, Const. 30 Maij,  
in reversione post mortem *J.*  
*Morton*. pat. 18 E. 4. p. 2.  
m. 12.

1 R. 3. *Thomas Barrow*.

1 H. 7. *Robert Morton* and *William Eliot*  
had the Office jointly,  
and Const. 13 Nov. pat. 1.  
H. 7. p. 4.

3 H. 7. *David Williams*, Const. 26  
Nov. Billâ sign' 3 H. 7.

7 H. 7. *John Blyth*, 5 Maij, pat. 7,  
H. 7. p. 1. m. 10.

9 H. 7. *William Warham*, Clerk, Const.  
13 Feb. pat. 9 H. 7. p. 1.

17 H. 7. *William Baron*, Const. 1 Feb.  
pat. 17 H. 7. p. 1. m. 2.

20 H. 7. *Christopher Bainbrigg*, 13 Nov.  
pat. 20 H. 7. p. 1. m. 26.

23 H. 7. *John Young*, Dean of *York*,  
Const. 22 Jan. pat. 23 H.  
7. p. 1. m. 7.

1 H. 8. *Johannes Young*, stiled *Vice-Cancellarius*,  
at the Ratification of a  
Treaty with *France*, Rot'  
Franc' 6 H. 8. Const. 11 Junij  
pat. 1 H. 8. p. 1.

8 H. 8.

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- 8 H. 8. *Cuthbert Tonstall*, 12 Maij,  
pat. 8. H. 8. p. 1.
- 14 H. 8. *John Clerk*, *Legum Doctor*  
Const. 20 Oct. pat. 14 H.  
8. p. 2.
- 15 H. 8. *Thomas Hamball*, 9 Oct. pat.  
15 H. 8. p. 2.
- 19 H. 8. *John Taylor*, 26 Junij, pat. 19  
H. 8. p. 2.
- 26 H. 8. *Thomas Cromwell*, Arm' 8 Oct.  
pat. 26 H. 8. p. 2. After  
Lord Cromwell.
- 28 H. 8. *Christopher Hales*, Arm' *Consili-*  
*arius & Attorn' Dom' Regis*,  
20 Julij, pat. 28 H. 8. p. 2.
- 38 H. 8. *Robert Southwell*, Mil' 1. Julij,  
pat. 33 H. 8. p. 1.
- 4 E. 6. *John Beaumont*, Arm' 13 Dec.  
pat. 4 E. 6. p. 6.
- 6 E. 6. *Robert Bowes*, Mil' 18 Junij,  
pat. 6 E. 6. p. 4.
- 1 M.Reg. *Nicholas Hare*, Mil' 18 Sept'  
pat. 1 *Mariae*; and *Custos Si-*  
*gil'* for fourteen Days.
- 4 and 5 2 *William Cordall*, 5 Nov. pat.  
P. and M. 5 4 and 5 P. and M. p. 7.

66      *The HISTORY*

23 El. Reg. *Gilbert Gerrard*, Milit' Attorn.  
Gen. 30 Maij, pat. 23 Eliz.  
p. 1.

36 Eliz. *Thomas Egerton*, Mil. 10 Ap.  
pat. 36 Eliz.

39 Eliz. *William Lambard*, Arm' Ma-  
gister Cancellar' 26 Maij, 39  
Eliz. con' Deputat' *Thomæ*  
*Egerton*, per eundem *Thomam*,  
*tunc existen' tam Custod' Si-*  
*gilli quam Rotulor'*

11 Jac. 1. *Edward Bruce*.

6 Jac. 1. *Sir Edward Phillips*.

12 Jac. 1. *Sir Julius Cæsar*, Const. 1  
Oct. in reversione post Mor-  
tem *Phillips*.

10 Ap. 2 *Sir Humphry May*, Const. in  
5 Carol. 5 reversione post Mortem *Cæsar*.

29 Nov. 2 *Sir Dudley Diggs*, Const. in re-  
6 Car. 5 versione post Mortem *May*.

18 Car. *Sir John Culpepper*.

*Sir Harbottle Grimston*, Const.  
Anno 1660, upon the Resto-  
ration.

11 E. 1. My Lord of *Bath*, Chancel-  
lor of *England*, was, by the Advice of  
the King's Council, deputed to go over  
the



the Sea with my Lord of Gloucester, and others of the King's Councillors, at that Time, therefore, for the Weal of the King and his Realms, and that the Execution of the King's Laws should not be letted for his Absence, a Privy Seal was order'd to be made out to deliver the King's Great Seal unto the Clerk of the Rolls; charging him to occupy it in the Execution of all Things of Right, and Course of Conscience, until the returning of the said Chancellor.

In the 6th of Edward 3. the Chancellor *Bourcher* appointed the Masters of the Chancery to attend the sealing of Writs and Patents. Claus. 6 E. 3.

Circa 15 E. 3. *Bourcher* Chancellor went to the King at *Norwich*, and left the Seal with one of his Clerks, under the Seal of two Masters of the Chancery, who, in his Absence, sealed with it at the Lodging of one of the Masters first, and after at *Westminster*, *Waller*, *Custos Rotular'*, had the Seal until the Chancellor went to his See of *York*.

49 E. 3. *Thorpe*, Chancellor, left the Seal with four Masters, or, as Sir *H. Spelman* styles them, *Guardians of the Chancery*.

*Burftall*, *Custos Rotulor'*, *Ravenfore*, Clerk of the *Hanaper*, and *Newenham*, were *Custodes Sigilli* in the last Year of E. III.

*Waltham*, *Custos Rotulor'*, together with the said *Ravenfore* and *Newenham*, were *Custodes Sigilli*, when *Michael de la Pool*, Earl of *Suffolk*, *Tempore R. 2.* went to *France* on the Business of the State. The Chancellor staid not long Abroad, and on his Return took a Journey to *Hull*, and *Waltham* was solely entrusted with the Seal, until he came back, and sealed Writs, but *in presentia Clericor' ambor' graduum*.

And in the 16th of the same Reign, by Privy-Seal, *Burftall* and *Ravenfore* were made Keepers *ad Sigilland' quod est de Cur-su Cancellar' & quod pertinet ad communem Legem. In dors' Claus' 16 R. 2.*

These few Instances, out of many that might be put, are just mentioned, to shew how the Master of the Rolls and the Masters in *Chancery*, from Time to Time, equally were employed and honoured with the keeping of the Seal.

They

They had Commission to act in Matters, according to the Form of the Common-Law, in the Absence of the Chancellor; but no where does there appear any Commission or Authority to them, to hear Causes or Suits by Petition or Bill, in the Equity-Court, in the Chancellor's Absence; for which Reason I am apt to imagine, that when any Suit or Petition happened in his Absence, which required an Absolute Power to determine, the Council, who as I have observed before, took upon them an Absolute Authority, or had a concurrent Jurisdiction in such Matters, did decide it.

For it is to be observ'd, that the Custody of the Seal did not confer upon the Keeper, or Commissioners, at that Time, the Power of the Chancellor, nor any Absolute Judicial Power. *Ralph Nevill* was Chancellor, and at the same Time there were two Keepers of the Seal, *Templar* and *Lexington*: The same *Nevill* afterwards had two different Patents, one to be Chancellor, and the other to be Keeper. (a)  
These

(a) Sir *John Pettus* Observation on Parliaments, 213. *Seld.* 3d Vol. 1468.

These two Offices were generally held by one ; yet it is frequent in antient Times, to find them fill'd by different Persons. The Chancellor took an Oath, the *Custodes* none at all : The Chancellor could present to the King's Benefices, the other not without special Licence for that Purpose : And even after the Statute of the 5th of the Queen, that declares the Authority of Lord Chancellor and Lord Keeper to be one ; during the Vacancy, upon the Death of Sir *Christopher Hatton*, the Great Seal was delivered to Lord *Burleigh*, Lord Treasurer *Hunsdon*, and two other Lords ; and a Commission to hear Causes was given to four Judges, *Clinch*, *Gaudy*, *Windham*, and *Periam*, Names well known in *Westminster-Hall*.

But now to come close to the Question ; What altho' it be true, that the *Custodes Sigilli* could not hear Causes in a Court of Equity or Absolute Power, without a special Authority or Commission for that Purpose, with which we do not find they were ever invested, yet what needs any such Commission appear, with respect to the Master of the Rolls, if he has a prescriptive

scriptive Right to hear Causes in the *Chancery*? The Answer to this must arise from those Reasons before spoken of, which make it probable, that the Master of the Rolls was not a Judge by the Constitution of the Court, *nor well could be*.

The Time I fix my self upon, shall be in a sort of a middle Scene between us and what we usually call Antiquity. The Reader will be pleased to recollect the Act of Parliament of R. II. which runs thus: *That when People be compelled to come before the King's Council, or in the Chancery, by Writ, grounded upon untrue Surmises, the Chancellor shall have Power to award Costs at his Discretion*; which has been observed, was the first Act of Parliament that erected it into something of a Model or Existence of a Court of Equity; from which we may collect, first, That in the Times preceding, Petitions or Suits, where such untrue Suggestions were made, were heard by the King's Council, or the Chancellor; the Disjunctive importing an Usage to sue to the one or the other, as two separate Courts. Secondly, That the Master or Clerk of the Rolls, before this Statute, had



had not been accustomed to hear Suits or Petitions, in the Presence or Absence of the Chancellor; for if he had, without doubt the Parliament, that gave Power to the Chancellor to *award Costs* on vexatious Suits and Surmises, would have provided at least for the *Chancellor's Absence*, and given the same (a) Power of *awarding Costs*

(a) It may be ask'd, how comes it about, that the Master of the Rolls awards Costs in many Cases, if no Act of Parliament gives him Authority to do it; and if no Act of Parliament is in the Case, it must be by the Constitution of the Court? 'Tis answer'd, The Act above shews the Constitution of the Court could not give the Chancellor Power to award Costs; therefore, the Master of the Rolls could not have it by the Constitution. The Master never makes any Order whatsoever, without being joyned with two other Commissioners, who are named in the Order, and give their Consent to it, as hereafter appears. How then comes the Master of the Rolls, &c. acting under the Authority of their Commission, to award Costs, which do not transfer or vest any Power in them, for that Purpose? All the Answer that I know of to that, is, That since that Commission sprung up, Usage and Acquiescence under it make it necessary to be submitted to: And tho' my Lord Coke affirms the Commissions given by *Wolsey* (of which this given to

*Costs* to the Master of the Rolls ; but this was not done ; so that if after this Statute, the Master of the Rolls should have claimed a judicial Power in the Absence of the Chancellor, it would have amounted to no more than to be a Judge in Shew and Appearance only, he could not *award Costs* on vexatious Suits ; that, by the Act of Parliament, is confin'd to the Discretion of the Chancellor : He could not be employed to do it by Commission neither, because it is a *Special Power* that could not be *transferred* to, or *vested* in the Master of the Rolls, or any other, even by Commission. From whence I conclude, that there was also at this Time no Commission in Use, for the Master of the Rolls to hear Suits in the Absence of the Chancellor ; to which the following Remark is obvious enough to be added.

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to the Rolls was one) to be void, yet it must now be taken to be a legal Commission. And indeed, when my Lord *Southampton* gave Commission to hear Causes in his Absence, the Judges at that Time said, it was void, because granted without the Authority of the Council, and put it on no other Foot ; which shews they were then come to be pretty well reconciled to it.

If the King's Council took upon (a) them to deal in these Suits, as without Question they did, and to call Persons before them by Writ, as the Statute mentions, we may easily judge where such Suits were determined, *when the Chancellor was occasionally absent*. And further, it is observable, in nigh fifty Acts of Parliament, that give special Authority to the Lord Chancellor solely, and to others joyned with him, there is not one that gives judicial Authority or Power to the Master of the Rolls in the Court : And since neither Chronicles, Annals, Historians, of

(a) But yet they looked upon themselves to be a seperate and superior Court. A Commission was awarded out of the Chancery, to apprehend a Man, and take his Goods and Chattels. The Justices of Oyer and Terminer took the Commission, affirming it to be unlawful and injurious, and that they would shew the same to the King's Council. 42 lib. Affiz. placito 5. Vide Stat. 4 H. 4. c. 22. And at the Parliament 6 H. 6. N. 32. the Commons, by Petition alledge, That all who held in Chief of the King, had used to have Licenses to alien from the Chancellor ; whereas such Licenses then of late, were only to be had from the King's Council ; so they pray it may be ordained, that the Chancellor may again have the granting of such Licenses. *Placita Parliament. 591. Rushw. 2 V. 474.*

of which there are not a few, nor Lawyers ancient or modern, amongst Discourses of far less Weight, have not left to Posterity, that I know of, any Hint or Remark of a Judicial Power in the Clerk of the Rolls, I am induced to conclude it very probable, that the Master of the Rolls, in the Opinion of our Ancestors, had no Judicial Authority to hear Suits and Causes in Equity, at the Time of the Act last mentioned.

We are now come to a more lightsome Period, the Reign of *H. VI.* (one particular Instance only excepted) when Suits and Petitions in the Court begin to be recorded. And now we shall observe some Places where the Master of the Rolls appears officiating in the Equity-Court, to see if any Argument for that Power can be drawn from thence. The first relates to *John (a) Waltham*. *Waltham* was

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doubtless

(a) Altho' the Commons declared by their Petition in Parliament, before noted, that *Waltham* was the first Inventor of the *Subpœna*; yet my Lord *Audley* said, *Temp. H. 8.* that a *Subpœna* lay in a Case then put before him, by the Fundamental Laws of England. *Br. Consc. 25.*

doubtless a Man of Parts, active and ambitious ; he mounted up at last to a (a) Crozier and white Staff. His Confidence and Trust with the Chancellor might be greater than ordinary, on the Account of his Spirit : He affected to act by Deputy, and had a License for that Purpose ; and he was the likeliest Person of all that enjoyed the Office of *Custos Rotulor* to have advanced his Place of an Assistant to that of a Judge ; between which the Transition is not very far, amongst Men equal in all other Respects : But when the Assistant proves greater in Business than him he assists, the Step into the foremost Seat will be almost of Course ; especially so it would have been in the Times of *Waltham* : But yet in the only one Instance I meet with, concerning him, he appears to be an Assistant only. The Case is scarce worth mentioning. It was a Cause that was referr'd to the Lord Chancellor *Michael de la Pool*, Earl of *Suffolk* ; by which it appeared, that one *Agnes Lumbard* was expelled from her Tenements in *Beverley*,

(a) Bishop of *Sarum*, and Lord Treasurer.



*Beverley*, by *Thomas Lumbard*. The Lord Chancellor, by Writing, under his Seal, awarded the Tenements to *Agnes* during her Life; and then my Lord, by the Advice of *Robert Belknap*, Chief-Justice of the *Common Pleas*, and *John Waltham*, Master of the Rolls, and others, order'd that she should be put in Possession, and an Order for that Purpose was directed to the Bailiff, Aldermen, and Burgessees of *Beverley*: The Chancellor makes the Award, by the Advice of the Judge, his *extraordinary Assistant*, and of the Master of the Rolls, and others, which I suppose to be meant of some of the Masters, the ordinary Assistants of his Court.

The next is, One was bound in a Statute Staple to *A.* and *B.* One of the Cognizees secretly released the Cognizor; the other Cognizee, not knowing of the Release, sued out Execution against the Debtor, brought an *Audita Querela*; and upon the *Scire Facias*, both Cognizees were demanded, and he that releas'd made Default, and it was ruled to be a Default in them both: Then the Question came to be, Whether the Plaintiff should pay Damages? The

Court inclin'd he shou'd not, saying, That it was against Conscience, that he who had no Knowledge of the Release, should pay Damages. But *Choke*, Justice in this Case, said, they must go according to *Law*; And the Master of the Rolls uses this Expression, *viz. He would be advised.* It is to be observed, that this was a Case, not in the Court of Equity, but in the *legal or ordinary Jurisdiction of the Court*; in which the Chancellor only gives the Rule; and yet by Judge *Choke's* Answer, it seems as if the Clerk of the Rolls was sent to consult with the Judge about the Matter. For it is usual for all Courts to enquire the Opinions of others; sometimes they have ask'd their Clerks about Matter of Costs. (*Cary* 109.) To know their Opinion, or the Expression, *That he wou'd advise*, imports no more than this, not content with *Choke's* Opinion, he would talk with some others about it.

The other Instance is 31 H. 6. and the Case is put thus: If I enfeoffe one to perform my last Will, and he enfeoffe a Stranger, I have no Cause of *Subpoena* against

against the second Feoffee, but may sue my first Feoffee, and recover in Damages for the Value of the Lands: And this appears to be said by *Yelverton* and *Kirkby*, Clerks of the Rolls.

This Opinion *per Yelverton* and *Kirkby*, I believe can be thought no more than an *obiter* Opinion given by them, not in a judicial Capacity; for in the next Year we find an Opinion express'd thus, *per Kirkby*, Clerk of the Rolls, and *Pool*, Serjeant; and it is usual for the Reporters in this Court, to set down the Opinions of learned Men, that were not Judges, as *per Willoughby* and *Spillman*, Serjeants; *per Jenny*, Serjeant, and *Fincham*, Apprentice, *per Coke* Attorney General, and Justice *Gawdy*, and so on.

These are all the Cases I find before H. 8. that give any Countenance to the Affirmative Side of the Question, which, in my humble Opinion, do not prove that the Master of the Rolls had any farther Concern in the Court than as an Assistant to the Chancellor; (a) a Capacity common

(a) *Vide* The Case of the Abbot of St. James, extra Northampton, in a foregoing Note; and in the

mon to him and the other Masters, under the ancient Course or Establishment of the Court.

It is just fit to be mentioned in this Place, that the Chancellor, besides these his ordinary Assistants, used to associate to himself, Peers, Bishops, and Judges; and the Decrees run, *per Curiam Cancel' & omnes Justiciar'*. Sometimes, *per Decretum Cancel' ex Assensu omnium Justiciarior' & alior' de Concilio Regis presentium*. Again in this Form, *Ideo Consideratum fuit per Curiam de*

the Orders of the Chancery, made *Anno 12* of King *Richard 2.* that begin thus: *Ordinatum est per dominum Cancellar', & per duodecem Clericos, de prima forma, ad robas in Cancellaria, domino Regis, Quod inter omnes Clericos de Cancellaria, tam de munere, quam de gestu ipsorum, de cetero leneatur & observetur Ordo Subscriptus*. Here the twelve Masters, of which the Master of the Rolls is the Head, all join in the Order. But the Set of Orders made in the Lord *Clarendon's* Time, were made by the Authority of his Lordship, and Sir *Harbottle Grimston*, Master of the Rolls, without the Concurrence of the Masters. By the Course of the Court, Bonds for Appearance upon Commissions of Rebellion may be taken in the Name of the Lord Chancellor, or Master of the Rolls, or in the Names of two of the Masters.

*de Affensu* Johannes Fortescue *Mil' Capital' Justic' Dom. Regis ad placita tenend' & diversor' al' Justic' & Servien' ad legem in Cur' present'*. And so the Form varied according to the Persons, *de Affensu*, of whom the Judgment or Decree was pronounced. But there is no Instance as I can find, where 'tis said, that any Decree was made by the Clerk or Master of the Rolls before *Wolsey's* Time; and if any are afterward to be found, they may be placed to another Account.

I reckon myself now to be got down as low as *H. VIII.* and whereas I have hitherto argued from Reasons that make it probable, if not necessary, to conclude, that the Master of the Rolls, as such, has no Judicial Power in the Court; I add, if there was nothing above *Probability* in the Case, which sometimes happens to be the only Guide; in the Absence of Certainty, 'tis reasonable, nay we are obliged to follow *Probabilities* to direct our Steps, which in Nature and Reason must turn the Ballance, when there is nothing in the opposite Scale to hinder it; yet here we have something clearer to walk by, and there



there seems to be that which amounts very nigh to Certainty, and a positive Determination in the Matter.

My Lord *Elsmere* says, The Chancellor is the only Judge in this Court.

My Lord *Coke*, That the Lord Chancellor, or the Lord Keeper, is the sole Judge both in this Court of Equity, and in the Court concerning the Common Law.

Mr. *Camden*, The Lord Chancellor is President in this Court, and there sit with him, as Assessors or Assistants to him, twelve Masters of the Chancery, whereof the principal or Chief is the Keeper of the Rolls belonging to the same Court, and thereupon he is called Master of the Rolls.

Sir *Robert Cotton* says, That the Chancellor is the King's Deputy alone ; if he dye, all *English* Bills in the Time of Vacancy are to be preferr'd and entituled to the King's most excellent Majesty in the Court of Chancery ; and 'tis certain, no Suits or Bills ever were or can be directed to the Master of the Rolls.

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MVSEVM  
BRITANNICVM

In

of the CHANCERY. 83

In the Law it is said, That our Court of Equity is a special (a) Trust committed to the King, and not by him to be committed to any but the Chancellor himself.

Sir Robert Cotton, and after him, the Author of *The Practice of the High Court of Chancery*, printed in the Year 1672, severally express themselves thus: “ I do  
“ not conceive that the Master of the  
“ Rolls hath a lawful Calling to be a  
“ Judge in the Chancery, in the Ab-  
“ sence of the Lord Chancellor, who is  
“ the only Judge of the Court, or by  
“ *what Authority* the Master of the Rolls  
“ *doth sit and determine Causes in the*  
“ *Chappel of the Rolls, as of late Years*  
“ *hath been used*, unless he be authorized  
“ thereunto by *special Commission*, under  
“ the Great Seal; the first President of  
“ which was Cardinal *Wolsey*.” Thus  
far Sir Robert Cotton, and that printed  
Book. More to the same Purpose might  
be mentioned, but this, in my humble  
Apprehension, is sufficient: The Chan-  
cellor,

(a) Hob. Martyn, *versus* Marshall. 63.

cellor, by the Constitution of the Court, is the *only and sole* Judge in the Court; the Conclusion is necessary, that the Master of the Rolls cannot be a Judge too; and therefore as all the twelve Judges in *Westminster-Hall* act by the King's Commission, I suppose the Master of the Rolls does so to; and if there wanted any Authority or judicial Determination in the Point, to corroborate the Testimony of the learned Persons just named, we have them too; which shall be observ'd, in the next Place, as we run through the History of the Commission granted to the Master of the Rolls, and others.

8 H. VIII. When *Wolsey* came to the Seals, poor People loaded him with Petitions, which at last he perceived were full of untrue Surmises, and feigned Complaints; he grew weary of them, and being like to be often absent in foreign Parts, he set up the four Courts above-mention'd, by the Authority of the King's Commission; one whereof was to the Master of the Rolls, to hear Causes in the Afternoon at his House, and this is the

the first Commission, as I take it, that is said to be given to the Master of the Rolls ; and altho' these Commissions were illegal, as Sir *Edward Coke* affirms, because the King cannot erect a Court of Equity by Commission ; the King's Commissions are like the King's Writs, and are void, if not allow'd by the Common-Law, or by Act of Parliament : And altho' *Wolsey's* Commissions were supported by neither, like many others in that Reign, yet by the President, a Ground-work was here laid of all the future Commissions to the Masters of the Rolls, and others.

My (a) Lord of *Southampton*, on the Demise of King *H. VIII.* gave himself up wholly to Matters of State, to oppose the Lord Protector's Measures ; so he granted a Commission to Sir *Richard Southwell*, Master of the Rolls, *John Tregonnel*, Esq; a Master in *Chancery*, two *Privy-Councillors* at that Time, *John Oliver* and *Anthony Bellasis*, that were *Civilians*, and also *Masters in Chancery* ; by which  
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they or any two of them were impower'd to hear and determine all manner of Causes in the *Chancery*, *in absentia Cancellarij*; but with a Proviso, that all Decrees made by them should be *presented* to the Chancellor, to be sign'd before they were in-rolled. This Commission made a great deal of Noise at that Time. The Lawyers were angry for fear the Civilians should do prejudice to the Common Law. And we have seen how the good old Counsellor *Baron*, almost *with Tears in his Eyes*, bewailed their coming into the Court as Masters; they had no Knowledge in Writs and the Business of the Seal, no Skill in Clerkship and writing *Court-Hand*, their *proper Business*. And in the End, the Commission was batter'd down, and was adjudg'd to be illegal, because granted by the Chancellor, without the Approbation of the Lord Protector and Council. The Judges held, the Chancellor could not thus depute his Authority to others: And yet my Lord *Southampton* seems to have done no more than copy'd after *Wolsey's* President, a few Years before.

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In the 4th of *Edw. VI.* my Lord *Rich* being sick, a Commission was granted to Sir *Robert Southwell*, Mr. Justice *Rede*, Mr. Justice *Portman*, and Mr. Justice *Hales*, *John Tregonnel*, Esq; *John Oliver*, Clerk, *William Cooke*, *John Croke*, Esq; and *Anthony Bellasis*, Clerk, five Masters of the *Chancery*, with a Clause of the *Quorum* to the Master of the Rolls, the Judges, *Oliver* and *Croke*.

During the Vacancy of the Seal, after *Christopher Hatton's* Death, a Commission to hear Causes, was given to four Judges, (a) in which the Master of the Rolls and Masters in Chancery, as I judge, were wholly omitted : After which, by degrees, it came to be thought proper by the Increase of Business, to enlarge it to all the Judges and Masters, as a standing general Commission. The Masters, I find, in the ancient Commissions, were more respected than in the latter. It was usual to insert some of their Names in the Clause of the *Quorum*, but they began wholly to be omitted in the Reign of King *James* the

First, (a) as I think on the Account of some Offence taken at them by the Publick. Howbeit, they were after continued in the Commission, to sit and hear Causes judicially, with the Master of the Rolls and Judges, in the Absence of the Lord Chancellor, as they did before, and many of them have been Gentlemen of great Probity and Learning.

Mr.

(a) Stat. 1 Jac. 1. c. 10. After the Preamble against Extortions and Corruption in the Offices of Justice, it is enacted, That no Person to whom any Order or Cause shall be committed or referred by any of the King's Courts at *Westminster*, or any other Court, shall directly or indirectly, or by any Art, Shift, Colour, or Device, have, take, or receive any Money, Fee, or Reward, Covenant, Obligation, Promise, Agreement, or any other Thing for his Report or Certificate, by Writing, or otherwise, upon Pain of the Forfeiture of 100 *l.* for every such Report or Certificate, and to be deprived of his Office and Place, in the same Court; the one Moiety of the said Forfeitures to the King, and the other Moiety to the Party grieved; with a Proviso, That it shall be lawful for the Clerk to take for his Pains, for writing of every such Report or Certificate, 12 *d.* for the first Side, and 2 *d.* for every Side after, and no more, upon Pain of forfeiting 10 *s.* for every Penny taken over and above the said Sum.

Mr. *Litton's* Case, (a) *Mich.* 41 and 42 *Eliz.* Mr. Justice *Clench* and the Masters decreed the Possession of a Copyhold Estate to be restored to the Plaintiff, from whom it had been taken by the Lord, on Pretence of Forfeiture, until the Forfeiture was try'd at Law.

(b) *Inter Hoddy and Lun, Mich. 5 Car. I.* The Case which, for Brevity sake, I refer to, was reduced to this Point, Whether a Court of Equity could decree against a Maxim of the Common Law? Upon which it was resolved by the Master of the Rolls, Mr. Justice *Jones*, and the Masters in *Chancery* then sitting in Court, by Virtue of their Commissions, that it could not. About which, I hope, none of them entertain'd so much as half a Doubt. It is also to be observed, that by the said general Commission, there must be three of the Commissioners to constitute a Court; three must make and subscribe a final Decree, before it is presented to the Chancellor to sign, in order to be enroll'd, and

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to

(a) *Cary* 6.

(b) *Mich. 5 Car. 1. 1 Rol. Ab. 375. 1 Danv. 775.*



to give it Effect ; as *e. g.* a Judge and two Masters are sufficient.

(a) *Mich.* 1684. In the Case of *Merreitt*, and *Eastwicke*, which came to be heard before Mr. Baron *Atkins*, Sir *Samuel Clarke*, Sir *Miles Cooke* and Sir *William Beversham*, three Masters of the Chancery, in the Absence of the Lord Keeper *North*, the Judge, it seems, was for decreeing against the Plaintiff ; but the said three Masters opposed him, and declared their Opinion to be, that the Plaintiff was intitled to Relief ; and thereupon the Court being divided, the Cause stood over to come on before the Keeper ; and being heard by him, he was of the same Opinion that the Masters were of, and accordingly decreed for the Plaintiff.

The Case is the same, with respect to the Master of the Rolls ; he must have the like Number of Co-Commissioners associated with him as the Judged ; for without them his Decree is void, and *coram non judice*.

In the (b) Case of *Smith* and *Turner*, a Decree

(a) *Vern. Rep. Anno 1684. Fol. 265.*

(b) *Vern. 274.*

Decree was made by the Master of the Rolls alone, which was held by the Lord Keeper *North* to be erroneous. The Words of the Book are: The Master of the Rolls cannot by his Commission, make a Decree without the Assistance of two Masters; to which may be added, or without the Assistance of some Two of the other Commissioners, in the same Commission named. The Consequence of this Resolution is, that the Master of the Rolls acts by Commission, and has no Prescriptive Right to hear Causes; for if he had, this Decree would not have been erroneous. After these two Cases, there are indeed two Remarks in the Book, which deserve some Notice. The Records of these two Cases have been searched it seems, and the principal Cases are not agreeable to, or not warranted by the Records; for in the one there is a Variance in the Day it was heard, in the other—the Record itself was thought fit to be inserted, which seems indeed to be a Case something different from that reported: However, Mr. *Vernon's* Assertion, that the Master of the Rolls, by his Commission

fion, cannot make a Decree without the *Assistance* of two *Masters*, is undeniably true, in the Manner I have before put it, by the Words of the Commission it self; and therefore I am inclined to think, that Mr. *Vernon's* Words are the Opinion of the Court, and were not forged by that Great Man. After all, if these Reports are loose, hasty, and incorrect; or, what is worse, not warranted by the Records, in two important Cases; why not in many? Why is not the rest of the Book rectify'd——So much of it is left *unfinished* and *incorrect*, that remains *unremark'd*. After thus *impeaching* the Credit of the Work, and casting Imputations and Suspicions upon the *Whole*, the clearing of the *Whole* became indispensable. Surely it was not necessary for the Remarkers to publish these things, to strike at Mr. *Vernon* so freely. Strange! to find an Advertisment in the very Book it self, that the Cases contained in it are not warranted by the Records. Mr. *Vernon's* Case, however, was confirm'd by the Lords Commissioners of the Great Seal, as I am very credibly informed, at the Revolution. After King

I do not  
ob-  
serve  
it. X

X that we in 1. Vern. 2. 73. of James  
2. 74. a correction from  
the record in a particular  
case. p. 11.

*James* went away, the Master of the Rolls sat and made Orders in the Court, under Pretence of a Prescriptive Right. But the Lords Commissioners held, that he heard Causes by his Commission only, which dropped by the Cesser of the Government under King *James*, as the Masters and all other Commissions did; and so the Lords Commissioners reversed the Order or Orders, made by the Master of the Rolls as void, and *coram non judice*, which I find is a Case commonly known. To which we may add a later Authority, the Name of the Cause I have forgot; but 'tis very well known, that an Order of Reference to a Six-Clerk, was made at the Rolls; to which, a *remarkable* Opposition, as I have heard, was made by the Masters then sitting in Court; which Order after was reversed by the late Lord Chancellor, as being founded on a Prescriptive Judicial Right: And this also was my Lord *Cowper's* Opinion, (as some now living can testify) when he refused to purchase under a Decree made at the Rolls, to which there did not appear the Concurrence of *two Masters*.

Thus

Thus far the Commission; and farther it will not be deny'd I believe, that the Masters are the Chancellor's Officers and Assistants *only*, by the Constitution of the Court; That they had not, nor now have, any Business at the Rolls at all, but on Account of the *Commission*, there *co-judicially* to sit with the Master: Here was the *Beginning* and *Cause* of their Attendance at the Rolls. If this then be so, if the Masters attend only on Account of the *Commission*, are we not warranted to say, that the Causes heard at the Rolls, have been all along heard by Virtue of the *Commission*? 'Tis true, the Masters are come to make little Use of their *commissional* Right, and the Reasons are plain; they have Business enough another Way; the Functions of Justice are of large Extent, require an exact methodical Knowledge of the Laws, and of a long Detail of the Rules and Principles of Equity, which the Masters (tho' some I know to have great Abilities) have always not Leisure to acquire: But yet, while the Commission stands upon the Model it does, their Attendance at the Rolls is necessary



sary to *legalize* the Proceedings in the Court.

By this Time, I suppose, one may venture to think that the Right to hear Causes at the Rolls is founded on *Commission*: And if any Body has a Mind to *object* and argue the contrary, he will be obliged to clear up and shew an uniform Usage before the Date of the Commission, *viz.* The Time of *H. VIII.* introduce it with some tolerable Account, how it first began, and became annex'd to the Keepership of the Rolls. He will also have it in his Mind, that *Prescription* in Law is an Usage that began before *R. I.* that if since, 'tis known to begin, it reaches not *legal* Prescription. And again, if the *Right* to hear Causes in the Chancellor's *Absence*, runs thro' all the Cases of Absence, as by Death or Removal, for every Vacancy of the Seal is an Absence of the Chancellor, he must tell us what Records he finds, during these Intervals, which frequently have happened for some length of Time; what Suits were commenced and determined then, to whom directed, and whatever of judicial Acts he meets with: And if in  
his

his Search, the ingenious *Objector* finds it true, which has been said, That our Court of Equity was a Trust reposed in the King, which he could not commit to any but his Chancellor, he may please to say, how it came about that a Share of it was committed to the Master of the Rolls : And, lastly, when he has disproved and answered what I have said, and hereafter shall say, I promise my Assent to his better Reasons upon the Whole, or any Part of what I have advanced, and shall be pleased to be set right, wherein I am wrong, and be thankful into the bargain.

I have done now what I intended to say concerning the *Commission* ; and if any Addition or Support was yet wanting to shew how this Office was originally constituted, there are other Arguments resulting from the inherent Qualities and Properties of the Office it self, which prove it of a Nature only ministerial. The *Adjuncts* will declare what the *Subject* is.

It is a fundamental Rule of Law, that a Judicial Office cannot be granted in Reversion (a). *Officia Judicialia non concedantur*

(a) 11 Co. 4. Co. Lit. 3.

*dantur antequam vacent* and this is, *pro commodo Regis & populi*; for he that might be able to execute Justice to the King's Subjects, at the Time of the Grant, might become unable and insufficient, before the Office fell; for which Reason, no Man, says my Lord *Coke*, is capable of a Judicial Office in Reversion. A (a) Court Leet, nor even the Mastership of an Hospital, cannot be granted in Reversion, no more than to be Parson of a Church can be granted to a Man in the Life of the Incumbent. And the Law I take to be the same, by Auditor *Curle's* Case, if the Office was of a mix'd Nature, partly judicial, and partly ministerial. Now the Masterhip of the Rolls has run with this Quality to be grantable in Reversion; and as it frequently has been, so still I suppose it may, under the Authority of those Instances, mark'd in the Catalogue of the Masters of the Rolls; which being contrary to the very Essence of a Judicial Office, the Conclusion is somewhat necessary, that 'tis not by Nature any Judicial Office.

Again, this Office has been executed by  
K
Deputy;

(a) 2 Jen. 126. *Hob.* 150. 4 Inst. 402. 2 Lev. 245

Deputy; *Waltbam* had a License to make one; and my Lord *Egerton*, who not only held both the Office of Master of the Rolls and that of Keeper together, in his Hands for above a Year; but afterwards appointed Mr. *Lambard* a Master in Chancery his Deputy, by the following Warrant.

“ **B**E it known, That I Sir *Thomas*  
 “ *Egerton*, Knight, Lord Keeper  
 “ of the Great Seal of *England*, and Ma-  
 “ ster of the Rolls of her Majesty’s Court  
 “ of Chancery, have constituted and ap-  
 “ pointed *William Lambard*, Esq; one of  
 “ the Masters of the said Court, to be  
 “ my lawful Deputy in and for the keep-  
 “ ing of the House and Messuage, com-  
 “ monly called the House of the Rolls,  
 “ situate in *Chancery-Lane*, in or near  
 “ the City of *London*; and also in and for  
 “ the safe keeping and ordering of all the  
 “ Records, Rolls, Books, Writings,  
 “ Evidences and Monuments being and  
 “ remaining, or which should or ought  
 “ to be and remain in the Possession or  
 “ Custody of me the said Sir *Thomas*  
*Egerton*

“ Egerton, as Master or Keeper of the  
“ Records, Rolls, Books, and Writings  
“ of her Majesty’s said Court of Chan-  
“ cery, by reason of the said Office of  
“ Master of the Rolls, ratifying and al-  
“ lowing whatsoever my said Deputy  
“ shall lawfully do in or concerning the  
“ Premises. This is dated the 26th of  
May, 1597.

I would observe, in the first Place, from this modern Instance, that here the Keepership of the Seals and of the Rolls were united, the same Person was allow’d to officiate in both : The noble Lord that was Keeper had, perhaps, in his Eye the Remark that was early made, not only that the keeping of the Records was originally in the Chancellor, but also that he could supply that Office *per suppositam personam*.

Secondly, It would be of some Use to know whether Mr. *Lambard* heard Causes in the Absence of his Master ; and if he did, by what Authority ? for tho’ a Prescriptive Right for that End could be proved to operate on the Principal ; yet to think it runs upon the Deputy, seems to



be without the least Colour or Warrant whatsoever : Therefore, I imagine that he was deputed for ministerial Purposes only, because there was then no Need of him as a Judge, the Business was not so great, but my Lord could execute both the Offices for a Year and more, preceeding the Appointment of *Lambard* ; so there was a Vacancy during twelve Months, if not during all *Lambard's* Time, when there was no seperate Master of the Rolls to act and hear Causes in the Absence of the Chancellor, either by Commission or otherwise ; but the Keeper did all the Work. It seems there was nothing for a Master of the Rolls to do : But had he been consider'd as an ancient judicial Officer of the Court, or if the National Business had required the Use of more Judges than one in the Court, the Patriots of that Time would hardly have seen the Office lie suppress'd in the Hands of the *Keeper*, to the Detriment of the Publick ; nor allow'd of the Deputation to *Lambard*, since the Appointment of Judges in this Court, is the undoubted Right of the Crown : Moreover, 'tis regularly true, as I take it, in Point of Law, that

that a Judicial Office solely reposed in a Man, either by Grant, Prescription, or Act of Parliament, cannot be exercised by Deputy; because 'tis a personal Trust appropriated only to the Person of the Grantee, to the End that ignorant Officers may not be let in, nor the Subjects oppressed, and also with a View to prevent the Sale of Judicial Offices, which frequently might be made under the Colour of Deputations; and the Policy of Law is so strict and tender in that respect, that in the lesser Streams of Justice, 'tis not permitted. Freeholders, in a Court Baron, that are Prescriptive Judges there, are not allow'd to delegate their Authority: The Inference from hence is, That if the Keepership of the Rolls had been a Judicial Employment in the highest Court of Justice amongst us, we should scarce ever heard of its being executed by Deputy; for all which Reasons I do imagine it only ministerial.

In like Manner is the Usage at this Day in the Chancery of *Ireland*, which was erected after the Model of our own: The Master of the Rolls there makes a

K 3

Deputy,

Deputy, he is purely Ministerial, and has no Judicial Voice in the Court; unless that Power be given him by his Commission. (a) It is said the Lord Chancellor in this Court is intrusted with the King's Conscience, and he cannot delegate it to another; nor doubtless cou'd the Master of the Rolls, in case any Share of that Trust was given him by the Constitution of the Court. Again,

This Office is grantable to two: It has been granted sometimes to two, when plainly there was no Need of an Encrease of Judges in the Court; and therefore they cannot be supposed to be created for the Purposes of any judicial Service there. King *James* the First, indeed, added a fifth Judge to each Bench, by his Commission, viz. Sir *David Williams* to the *King's Bench*, and Sir *William Daniel*, both Serjeants at Law, to the *Common-Pleas*; but there it was done for the Furtherance and Dispatch of Business. But the Appointment of two Persons to this Office, if the Precedents were to be followed, would frequently

(a) *Vide Sir John Smith, Lord Kepeer, his Speech in Parliament.*

quently perplex and entangle it; these two must both agree in Opinion and Judgment, otherwise no Order could be made, or Business done; a real Grievance therefore would often happen to the Suiters, from that and other Accidents that might be mentioned, in case this Office, being judicial, was granted to two, 'which is another Reason to me to believe that 'tis only ministerial. To which I add, that in the Times when References to Masters were just begun, I find the Matter of an insufficient Answer, relating to the Jurisdiction of the City of *Canterbury*, was refer'd to the Master of the Rolls, Sir *Gilbert Gerrard*, as I take it, in a ministerial Way. *Anno 24 and 25 Eliz. Pract. of the Ch. 160.*

But, without any Authorities, or constructive Arguments whatsoever, there seems to me to be, in the Case, that which is of greater Import and Weight, than any Authority whatsoever, that is the Reason of the Thing itself; there is to me a natural Unfitness in the Matter, to suppose that a high and noble Judicial Employment, requiring Men of the most elevated Knowledge and Experience

rience to execute, should be incorporated by Time or the Consent of Men with a ministerial Office ; where a common Trust and Attendance were only required. The Law, that follows the Course and Order of Nature, will not annex a superior Thing to an inferior, or Things that do not agree in Nature and Quality together, as common of *Eftovers* and *Turbary* can't be Appendant or Appurtenant to Land, but to a House, to be spent there ; a Seat in a Church must be Appendant to a House, not to Land ; a Leet can't be Appendant to a Church or Chapel : Can any thing be more disagreeing in Nature and Quality, than a ministerial and judicial Office ? For Instance, If two Masters, authorized by the general Commission to sit with the Master of the Rolls, should over-rule him, and order some special Matter to be referred to themselves ; and I will not venture to say they may not do so ; this wou'd be very odd : And the Case is near the same, when they sit and tacitly consent to an Order of Reference to themselves, which always, when the Chancellor is Absent, is the Case, whether at  
*West-*



*Westminster* or at the Rolls ; even then, in Effect, they are both Agents and Patients : In my Mind, to be one half *Judge* and the other half *Master* does not well agree ; 'tis opposite in it self. A Judicial Officer may prescribe to dispose of ministerial Places under him, as the Chief Justice does of the Chief Clerk, and others ; Ministerial Offices have antient Rights too, such as are suitable to their Nature : [I remember no Case where a Ministerial Office prescribes to have a judicial one as Appendant. But I remember in the Law Books, that the Office of a Justice of Peace, which is Judicial, cannot by Prescription be annexed to the Office of Mayor or Bailiff of a Town which is ministerial : And yet this I suppose is the present Case ; for the Words of the Grant observ'd above, *viz. Constitumus A. B. Custodem Rotulorum*, import and prove this Office to be originally in its Nature ministerial, and could never possibly by any Construction convey a Judicial Capacity to the Grantee ; if now they have the Effect to carry and convey it, it must be by Practice and Usage since the Time of the original Grant ; that is  
the

the Judicial Quality or Power, by Time, has been grafted on or annex'd to the Ministerial, contrary to that natural Order and Fitness, which we imagine ought to be in things themselves.

Lastly, The Necessity to make Provision for hearing Causes, in the Absence of the Chancellor, can be dated, in my Mind, no higher than *Henry* the Eighth. To the Time of *H. VI.* there are no Records or Reports at all of Petitions or Proceedings in Equity. Our Reporters, who in those Times were employ'd by the Crown, wou'd have been faithful and exact in transmitting them to us, as they have the other Parts of our Learning, if there really had been such : And again, from *H. VI.* to *H. VIII.* when the Times grew clearer, with the same Fidelity and Care, they would have told us, if the Truth had been so, that the Master of the Rolls was more than an Assistant to the Chancellor, and had a Right to hear Causes in the Court ; but this they have not done. But they have told us the Chancellor sometimes was attended by the Council, Judges, and other learned Men

Men, for their Advice, as the Manner of those Times was ; and if a Man might guess from what appears, sixty Causes in a Year were perhaps more than were actually heard in the Court, till the Days of *H. VII.* Nay, after *Wolsey's* Time, who made every Place a Court, and received Petitions from People wheresoever he went, there were so few Causes that in the Time of his Successor Sir *Thomas Moor*, we find in the 22d Year of *H. VIII.* he read all the Bills exhibited into Court himself; and there were some Days in Term, when there were neither one Motion made, nor Cause (a) heard : But now it began to swell out, there had been before several Acts of Parliament, giving special Power to the Chancellor and others : Now they multiply'd, and a Profusion of Business was soon poured into the Court, by the broad-spreading Statutes of Uses (I take my Lord *Coke's* Expression) of Wills, Bankrupts, Charitable Uses, and others; also

(a) *Vide* Preface to 3d Mod. *Examen Legum*  
*Angl.* 105.

also the sudden and vast Growth of Wealth, and personal Estates, and as a Consequence of that, Frauds and Corruption thickened and follow'd in Abundance, Trusts that are now become infinite, the Abolition of the Court of Augmentations, the President and Council of the Marches of *Wales*, and that for the Northern Parts, the Court of Request, of Wards and Liveries, the Business of Ideots, Lunaticks, the Statute of Distributions, Excesses of Jurisdiction, Reviews and Rehearings, which grew 'more numerous, and the enormous Encrease of Exceptions and Reports. Thus we may see, pretty plain, how, by Degrees, and when it became necessary to provide for the Hearing of Causes; and that the present Commission, in the Absence of the Chancellor, which as I judge, and others assert, is founded upon the Model of that which *Wolsey* gave to Doctor *Tonstall* at the Rolls; who certainly never would have *accepted* of, nor *Wolsey* given it him, if any Usage before had annexed that Authority to his Office; and the rather, because the Rashness perhaps might have *endangered* the *Extinction* of

of the Prescriptive Right. But enough I suppose, by this Time, to support an Opinion, that by the Constitution of the Court of Chancery, the Chancellor is *the only Judge*; that the Master of the Rolls and the Masters were and still are *equally Assistants, not Judges*, in the more ancient Common-Law Court; that, for any Thing appearing to the contrary, they were received and retained in the Equity-Court, in the same Capacity, and no other, and so do continue; and as far and as clear as a negative Conclusion can be proved, that the Master of the Rolls has no judicial Power in the Court. And lastly, as a Consequence from the whole, that his Authority in that respect is founded *upon the King's Commission(a)*, in Conjunction with

L

two

(a) It was forgot to be observed in the proper Place, that there are Interlocutory Petitions heard at the Rolls which are directed and intituled to the Master of the Rolls only; for answering of which there are Fees paid to the Master. Now, in the first Place, I find that the Business of Petitions is subject to the Regulation and Order of the Chancellor; for in *Anno 16 Caroli*, the Master of the Rolls was restrained from receiving Petitions, in certain Cases, by the Lord Keeper's Order. *Vide* the printed Orders:

And



*two or more* Persons named in the Commission. And now for the Close.

Upon hearing in Company some wild *post-prandium* Talk on this Subject, and a Prescriptive Right to hear Causes disputed, and asserted to be in the Master of the Rolls; but the Assertion of each side, I observed, made commonly both the Argument and the Proof; for 'tis an old and dextrous Way in resolving Questions that are puzzling,  
to

And if this, and what has been said on this Subject, be true, it must be taken that the Fees paid for answering Petitions took their Rise from the Appointment of the Chancellor, or some Order made by the Court for that Purpose: And as to the intituling Petitions only to the Master, and not to any other Commissioners, it is to be consider'd, that the Master, in the Absence of the Chancellor, sits at his House as a constant standing Judge; it is unknown which of the Masters in Chancery, that are Co-Commissioners, will sit with him; these last take it by turns; therefore the Clerks and Solicitors, who draw their own Petitions, have brought it into Practice, by reason of that Uncertainty (and *propter excellentiam personæ*) to direct and intitle their Petitions to the Master only. It may also be observed, that the first Commission given by *Wolsey*, was singly to the Master of the Rolls, for this Reason, that the Cardinal was tir'd of poor People's Petitions; 'tis likely therefore he opened a Court at the Rolls for the Purpose of Hearing Petitions.

of the CHANCERY. III

to say, they are so by Prescription or Common Law ; as Philosophers have their *occult Qualities*, on Occasion, to solve Phenomena in Nature. I had a Mind therefore to help my own Thoughts in the Matter, and really to try which Opinion was defensible, having, before I sat down to writing, put into the Scales whatever I found of any Weight, to see how the Beam wou'd turn.

The Materials I was to use lay scattered up and down ; and the Collection, such as it is, I have sorted and connected as well as I could, and with all the Clearness and Consistence the Nature of it, and the Compass and Time I allow'd my self, would permit.

And, in the Order they lie, I presume, we may see the Rise of our Court of Equity ; enough of the Duties and Functions of the Ministers therein, to satisfy any Doubts that may have been conceived, concerning the Judicial Power, or the Rank of the Masters. It is a Court which we find growing up in the State, from a Root in the old Constitution ; but growing, methinks, in a Figure like a *Pyramid reversed*, which tho' a Position seemingly unfirm,

yet the Point proved hard and strong, the Ground *yielding and soft about it*, where piercing, and deepning it self by Time, it became the firmer the longer it stood : But still there are those that think it *too broad* about the Top, and that, was it *eased and lightened* of its Weight, by paring away the *Top-heavy Parts*, the Stability of the Figure might be rendered more strong; especially since there has been some *late Concussions in the Air and Ground about it*. Again,

The Scituation of this Court had mighty Advantages; for rising as it did at the Head of the Monarchy, it could not possibly fail to grow both strong and great, nor yet to do us much good, if kept within due Bounds, the Danger lay only in the Excess; for Absolute Power we know is not apt to be too modest, its Hands are long, and can reach out farther than they ought; and surely it may be said, that *Stretches have been made, and Seizures too frequent on the Laws it pretends to moderate*; and I hear of some Talk as if these *were yet farther to be pill'd and poll'd to pay for the very Sins and Iniquities of the First.*

From

From Reflections upon the Nature and Extent of discretionary Rules, that govern in the Court we are speaking of, it may be observ'd there is scarce a middle Way between judging by stated Rules and by Discretion, which is a Word that may stand for any Thing : Nay farther, the Difference is but small between moderating the Rigour of old Laws, and making of *new* ; and therefore it seems to be of Consequence to a People to have Justice and Property kept to fixed and stated Rules ; to which I imagine very near approaches may be made in this Court : And it must not be forgot, *that we have lived to see a Time we had Reason to wish for,* when this Court was *not only inclined, but active and pressing* to come at that Point, to *Settle and Ascertain a monstrous Vexata Questio,* which often has perhaps *devoured the Estates* of those that had to do with it. The Consequence is well known.

Our Ancestors well knew the Benefit of a Certainty in Laws, to which *their Persons and Properties* were subject, when they toiled to get their *Avitæ Consuetu-*

dines settled and confirmed, when they required their (a) Confessors to be perfect in *Magna Charta*, to press it on the People as a Doctrine to be known and in Conscience observed, when they refused *unâ Voce* to admit of foreign Laws, and to change their own, and heartily opposed the Advances made by the Power of this Court against them.

The Laws have Defects, so have the wisest of Men; for nothing humane can possibly be without them; yet still they are Laws; and to moderate, or which is near the same thing, to amend them, ought sparingly to be done;

— *Vir bonus est Quis,  
Qui Consulta patrum, qui Leges Juraque servat,*

is good Morality, and good Conscience too. Amendments of any sort are proper to be apply'd for in another Place, about which, some have had the Rashness to think, and  
not

(a) *Pupil. Occuli* 59. *Bracton* somewhere styles them *Leges Juratae*, because they were sworn to when made. *Vide Prynne's Collection. Tom. 3. Fol. 158.*



not long ago, *that the Ax would* do special Service ; but sure I am the *pruning Knife*, sometimes will, if skilfully apply'd, *and we come into an Humour of making more use on't*: but I must not suffer these Matters to grow upon my Hand, I will therefore detain the Reader but with one Word more.

The Masterhip of the Rolls, originally no very considerable Office; in the Nomination of the Chancellor, grew up likewise under the Shadow of this Court, by Favour, and a Succession of Great Men, who always add Weight and Authority to Places they pass thro': And 'tis now long, I may say, since the Master of the Rolls has been seated and considered in a high Judicial Rank, in a Trust of the greatest Honour and Importance; and surely it was never discharged by any who possessed a nobler Integrity of Mind, and Love for Justice, than the honourable Person that holds it now.

It is therefore a sensible Concern to all who desire to see a Reformation in this Court, that any thing should deprive the Publick of what he is capable of doing to the Furtherance of that Work. It will be too hard for one Man to drive back to  
its

its proper Current, a Court that has gone on in a rapid Course of unlimited Power. If an Order is but made to cut off a burthensome Expence, to shorten the old Lengths for the Benefit of the Suitors, a Defalcation, tho' never so small, runs to the very Quick in *Chancery-Lane*. Malice goes to work, Clamours, Outcries, and Oppositions arise, and in the End may grow more than one Man perhaps could tell how to deal with : But further,

The ordinary Business of the Court has long been too much for one, and enough for two. It happens by some Means or other, that almost all Causes both great and small *drop* into its *Cistern* ; the Intervals must be few to think of Reformation : It was not lawful for the *Prætor Urbanus* to hear Causes after Sun-set, but ours we see posting on till *Midnight*, to master and keep down the Business of his Court. *Hujus sors ea fuit, Juris dicundi, in qua gloriam conciliat magnitudo Negotij, gratiam, Equitatis largitio ; in qua sorte sapiens Prætor Offensionem vitat æquabilitate decernendi, benevolentia adjungit lenitate audiendi. Cic. Orat. pro L. Muræna.*

Thus

Thus have I freely spoken my Thoughts, and treated a Question, wherein two high Stations are concerned, but yet with all the Reverence and Regard that is due to those that possess them ; for of this all ought to be persuaded, that whether they reason upon this Subject, or think not at all about it, or whatever Opinion they may have, yet the Liberty of their Sentiments does not free them from the Necessity of paying all Honour and Respect to their Persons and Offices. And I reckon, from their Candour, the Point itself amounts to no more between them, than the Difference in Opinion may just amount to, at least for any Thing I know to the contrary.

As to one of them, the Business seems to rest as he found it ; for I have never heard that he made himself either Plaintiff or Defendant in the Case. We may be sure Great Men are not easily to be moved ; and we below, who have been at any Trouble to observe what has pass'd in the World, consider Disputes, especially about *Rights, Privileges, and Interest*, as common Events, resulting almost from the mere Constitution of Men and Things.

For

For my Part, I reckon upon Things going on always in the same Way, notwithstanding the Institutions of *Zenophon*, the Republick of *Plato*, and the *Utopia* of the Moderns, have come to enlighten and instruct us. As I found the World, so I expect to leave it: If any Thing is out of order or amiss, or has the Effect to perplex the Administration of Justice, to interrupt or *delay* it, That belongs to our Superiors to rectify, and for a Man of my Level to follow old *Bracton's* Rules, (a) *Honeste vivere; neminem ledere; & jus suum cuiq; tribuere.*

(a) *Bracton, lib. 1. c. 4. n. 6.*

## F I N I S.

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## E R R A T A.

PAGE 35. l. 13. *read* had almost. P. 42. l. 21. *dele* afterward. P. 49. l. 15. *r.* the Reign of E. 3. P. 82. l. 25. *r.* Original Suits. P. 96. l. 6. *r.* (if he be not convinc'd.)

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A  
T A B L E  
O F T H E  
P R I N C I P A L T H I N G S  
C o n t a i n e d i n t h i s  
T R E A T I S E.

**O***F the Two Courts in the Chancery, viz.  
the Legal and the Equity-Court.*

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A



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